EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

1/18/44

No. 10164

United States
Circuit Court of Appeals
For the Ninth Circuit.

GALLATIN FARMERS COMPANY,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Taxpayer:
J. M. STOTESBURY, Esq.
NORMA E. SKARSTEN, Esq.

For Commissioner:
ALVA C. BAIRD, Esq.

Docket No. 107778

GALLATIN FARMERS COMPANY,
a Corporation,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

June 9—Petition received and filed. Taxpayer notified. (Fee paid.)

June 9—Copy of petition served on General Counsel.

July 30—Answer filed by General Counsel.

July 30—Request for hearing in Helena, Montana, filed by General Counsel.

Aug. 8—Notice issued placing proceeding on Helena, Mont., Calendar. Service of answer and request made.

Aug. 15—Hearing set Sept. 22, 1941, in Helena, Montana.

1941

Sept. 23—Hearing had before Mr. Arnold on the merits. Submitted. Stipulation of Facts filed—Briefs due Nov. 7, 1941. Reply briefs due Dec. 2, 1941.

Oct. 7—Transcript of hearing 9/23/41 filed.

Nov. 3—Stipulation re stock certificate #598 filed.

Nov. 3—Notice of appearance of Norma E. Skarsten as counsel filed.

Nov. 3—Brief filed by taxpayer. 11/4/41 copy served on General Counsel.

Nov. 4—Brief filed by General Counsel.

Nov. 28—Reply brief filed by taxpayer.

Nov. 28—Reply brief filed by General Counsel. Served 11/29/41.

Nov. 29—Copy of reply brief served on General Counsel.

1942

Jan. 28—Memorandum opinion rendered, Arnold, Div. 12. Decision will be entered for the respondent. 1/28/42 copy served.

Jan. 28—Decision entered, Arnold, Div. 12.

Apr. 20—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Apr. 21—Proof of service filed.

Apr. 20—Praecipe filed by taxpayer.

Apr. 30—Affidavit of service of filing petition for review by mail, filed by taxpayer.

May 28—Proof of service of praecipe filed. [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 107778

GALLATIN FARMERS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency 90-D, dated April 2, 1941, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation, with its principal place of business at Bozeman, Montana. The returns for the periods here involved were filed with the Collector for the District of Montana.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 2, 1941.

3. The taxes in controversy are income taxes for the calendar year 1938 in the amount of Ninety-nine and 32/100 Dollars ($99.32), and for the calendar year 1939 in the amount of Four Hundred Thirteen and 12/100 Dollars ($413.12), a total [2] amount of Five Hundred Twelve and 44/100 Dollars ($512.44).

4. The Commissioner erred in assessing the deficiency in the following particulars:

(a) The disallowance of the deduction of $798.00 for the year ending December 31, 1938, taken by the taxpayer as interest paid or incurred in the course of business.

(b) The disallowance of the deduction of $798.00 for the year ending December 31, 1939, taken by the taxpayer as interest paid or incurred in the course of business.

(c) The disallowance of the sum of $3,485.93 taken by the taxpayer as patronage dividends in excess of the amount the Commissioner claims is allowable by law.

5. In support of this petition the taxpayer relies upon the following facts:

(a) The payment of interest in the sum of $798.00 represents the payment of interest compulsory by action of the stockholders, who, in a meeting held January 18, 1938, declared the preferred stock to be a debt of the corporation, and the payment of interest a definite obligation irrespective of earnings.

(b) The deduction of $798.00 as interest for the year ending December 31, 1939, was for the same reason and under the same authority as set forth in paragraph (a) hereinabove.

(c) The taxpayer refunded to its customers the sum of $14,860.30 as patronage dividends for the year ending December 31, 1939. [3]

Wherefore, your petitioner prays that this proceeding be heard and it be determined that there is

no tax due for the years ending December 31, 1938 or December 31, 1939.

(Signed) J. M. STOTESBURY
Counsel for Petitioner.

(Duly verified.) [4]

EXHIBIT A

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Salt Lake City, Utah

Office of
Internal Revenue
Agent in Charge
Salt Lake Division

April 2, 1941.

Gallatin Farmers Company,
125 North Wallace Avenue,
Bozeman, Montana.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) ended 12/31/38 & 12/31/39 discloses a deficiency of $512.44 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

EXHIBIT A—(Cont.)

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Salt Lake City, Utah, for the attention of 90D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By

(Signed) J. P. MARSTELLA

Internal Revenue Agent in Charge.

Enclosures:

Statement.

Form of waiver. [5]

90D

JTG

STATEMENT

Gallatin Farmers Company,

125 North Wallace Avenue,

Bozeman, Montana

Tax Liability for the Taxable Years Ended December 31, 1938 and December 31, 1939

Income Tax	Liability	Assessed	Deficiency
1938	$372.42	$273.10	$ 99.32
1939	413.12	None	413.12
Totals.....	$785.54	$273.10	$512.44

EXHIBIT A—(Cont.)

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 18, 1940; to your protest dated December 3, 1940; and to information contained in your letter dated February 14, 1941.

In your protest it is claimed that you are entitled to exemption from taxation under the provisions of Section 101(12) of the 1938 Revenue Act and Internal Revenue Code. Based on information and data previously submitted by you to the Bureau and after careful consideration, it was ruled that you were not entitled to exemption. Since that time no information has been submitted to show any material change in the character of your organization or your method of doing business. It is accordingly held that you are not entitled to exemption from taxation as claimed.

A copy of this letter and statement has been mailed to your representative, Mr. J. M. Stotesbury, Bozeman, Montana, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [6]

Taxable Year Ended December 31, 1938

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$2,184.78
Unallowable deductions and additional income		
(a) Interest on preferred stock	$ 798.00	
(b) Cancellation of check	18.52	816.52
Total		$3,001.30

EXHIBIT A—(Cont.)

Nontaxable income and additional deductions	
(c) Additional allowance for expenses	21.95
Net income adjusted	$2,979.35

EXPLANATION OF ADJUSTMENTS

(a) In your return for the year 1938, a deduction of $798.00 for interest on preferred stock was claimed. A like deduction for interest paid on preferred stock was also claimed in your 1939 return. This deduction for each year for so-called interest on preferred stock is disallowed on the ground that such in reality was a dividend paid on your preferred stock and therefore not an allowable interest deduction paid on indebtedness as provided by Section 23(b) of the 1938 Revenue Act and Section 23(b) of the Internal Revenue Code.

(b) A check issued in 1937 for this amount and charged to expense on your books and return for that year was cancelled during the taxable year 1938. This amount is therefore treated as taxable income for the latter year.

(c) Adjustment is made to allow as a deduction expense items aggregating $21.95, which were charged to Surplus Account on your books and not claimed as a deduction in your return for the taxable year. [7]

COMPUTATION OF TAX

Excess-profits tax:	
Taxable net income	$2,979.35
Less: 10% of $40,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1938	4,000.00
Net income subject to excess-profits tax	None
Excess-profits tax assessed:	
Original, Account No. 41104	None
Income tax:	
Taxable net income	$2,979.35
Less: Excess-profits tax	None
Special class net income	$2,979.35
Tax at 12½% on $2,979.35—total tax	$ 372.42
Income tax assessed:	
Original, Account No. 41104	273.10
Deficiency of income tax	$ 99.32

Taxable Year Ended December 31, 1939

ADJUSTMENTS TO NET INCOME

Loss as disclosed by return		($1,132.35)
Unallowable deductions and additional income		
(a) Interest on preferred stock	$ 798.00	
(b) Recovery on bad debt	10.00	
(c) Profit on sale of truck	50.00	
(d) Excessive patronage dividends	3,485.93	
(e) Accrued capital stock tax	42.00	
(f) Montana corporation license tax	59.12	4,445.05
Total		$3,312.70
Nontaxable income and additional deductions		
(g) Adjustments to Accounts Receivable		7.77
Net income adjusted		$3,304.93

[8]

EXHIBIT A—(Cont.)

EXPLANATION OF ADJUSTMENTS

(a) This deduction is disallowed for the reasons given in connection with item (a) of the statement for the preceding year ended December 31, 1938.

(b) In the year 1938 a deduction for a bad debt was claimed by you. In the year 1939 the debtor gave to you his common stock, par value $10.00, in part payment of the debt, which stock was thereupon cancelled by you. This recovery is held to be taxable income for the year 1939.

(c) In the year 1939 an old truck fully exhausted by depreciation allowances was sold for $50.00. This amount was credited to an asset account on your books and not reported as income in your 1939 return. Adjustment is made to reflect this amount in taxable income for that year.

(d) In your return for the taxable year ended December 31, 1939, a deduction for patronage dividends in the amount of $14,860.30 was claimed. It is determined that the patronage dividends allowable as a deduction for the taxable year amounted to $11,374.37, computed as shown below, and the excess amount claimed, or $3,485.93, is therefore disallowed:

COMPUTATION OF DEDUCTIBLE PATRONAGE DIVIDENDS

Loss per books after deducting patronage dividends	($ 1,132.35)

EXHIBIT A—(Cont.)

Additions:		
Patronage dividends deducted	$14,860.30	
Dividends paid on preferred stock	798.00	
Recovery on bad debt	10.00	
Profit on sale of truck	50.00	
Capital stock tax	42.00	
Accrued corporation license tax	59.12	
Income tax refund — nontaxable income	995.77	16,815.19
Total		$15,682.84
Deductions:		
Income tax for 1934	$ 572.25	
Income tax for 1938	273.10	
Adjustment of Accounts Receivable	7.77	853.12
Income as adjusted		$14,829.72

[9]

Brought forward — Income as adjusted		$14,829.72
Distributions:		
6% dividend payable on common stock	$ 1,183.20	
6% dividend payable on preferred stock	798.68	
Provision for Reserve fund	755.63	
Provision for Educational fund	717.84	3,455.35
Income available for patronage dividends		$11,374.37
Patronage dividends claimed as a deduction on your books and in your return		14,860.30
Adjustment for excessive patronage dividends		$ 3,485.93

(e) The amount of $42.00, representing accrued capital stock tax for the capital stock tax fiscal year

EXHIBIT A—(Cont.)

ended June 30, 1939, was properly claimed as a deduction in your return for the year 1938 and was allowed. The amount, however, was not entered on your books until 1939. This amount, in error, was again claimed as a deduction in your 1939 return and is disallowed.

(f) An amount of $59.12 representing Montana corporation license tax for 1938 was properly claimed as a deduction in your 1938 return and allowed, although not entered on your books until 1939. This same amount, in error, was deducted in your 1939 return and is disallowed.

(g) A deduction of $7.77 is allowed in order to bring your Accounts Receivable Control account into agreement with the actual list of accounts receivable.

COMPUTATION OF TAX

Excess-profits tax:		
Taxable net income		$ 3,304.93
Less: 10% of $42,979.35* adjusted value of capital stock for capital stock tax fiscal year ended June 30, 1939		4,297.94
Net income subject to excess-profits tax		None
Excess-profits tax assessed:		
Original, Account No. NC-86769		None
*Declared value of capital stock for capital stock tax fiscal year 6/30/38	$40,000.00	
Net income for 1938	2,979.35	
Adjusted value of capital stock	$42,979.35	

EXHIBIT A—(Cont.)

Income tax:	
Taxable net income	$ 3,304.93
Less: Excess-profits tax	None
Special class net income	$ 3,304.93
Tax at 12½% on $3,304.93	$ 413.12
Income tax assessed:	
Original, Account No. NC-86769	None
Deficiency of income tax	$ 413.12

[Endorsed]: Filed Jun. 9, 1941. [11]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. (a) to (c), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (c), inclusive, of paragraph 4 of the petition. [12]

5. (a) to (c), inclusive. Denies the allegations

contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
Division Counsel,
T. M. MATHER,
HARRY R. HORROW,
Special Attorneys,
Bureau of Internal Revenue.

HRH/vg 7-25-41

[Endorsed]: Filed Jul. 30, 1941.] [13]

[Title of Board and Cause.]

STIPULATION OF FACTS

The parties hereto through their respective counsel hereby stipulate and agree that the statement set forth below is true and that it may be accepted by the Board as its findings of facts in this proceeding:

I.

The petitioner is a corporation incorporated and

operating under the provisions of Chapter 38 of the Civil Code of the State of Montana.

II.

The petitioner kept its accounts and filed its income tax returns on the accrual basis.

III.

During the taxable years 1938 and 1939, the petitioner had common stock outstanding as follows:

[14]

January 1, 1938	Common Stock (par value)	$18,940.00
December 31, 1938	Common Stock (par value)	19,515.00
December 31, 1938	Common Stock (par value)	19,495.00

IV.

That on January 18, 1938, the stockholders authorized the issuance of preferred stock in accordance with a resolution, a copy of which is hereinafter attached as Exhibit A.

V.

Pursuant to said resolution preferred stock was issued during the year 1938 so that as of December 31, 1938, and December 31, 1939, there was issued and outstanding preferred shares of the par value of $13,300.00.

VI.

During each of the taxable years 1938 and 1939 there was paid the preferred stockholders $798.00, which was claimed by the petitioner as a deduction on its returns for those years as interest paid and which amounts were disallowed by the Commissioner on the ground that such sums constituted dividends.

VII.

That there was accrued on the books of the petitioner as patronage dividends at the end of the calendar year 1939 the sum of $14,860.30, which sum was paid subsequent to the close of the taxable year 1939. [15]

VIII.

During the calendar year 1939, the petitioner declared and paid out of prior years' earnings the sum of $1.183.20, which was a 6 per cent dividend on the common stock for the year ended December 31, 1939.

IX.

The net income for the taxable year 1939, after deducting the amount of $798.00 paid on preferred stock, claimed as a deduction for interest on the petitioner's return for said year, is the amount of $14,-031.72. The Commissioner has disallowed as a deduction the said sum of $798.00, deducted as interest by the petitioner for the taxable year 1939, on the grounds that said sum is a dividend on preferred stock, and the net income for said year as so adjusted is the sum of $14,829.72 before making provision for the following amounts which the Commissioner has held must be provided for before the payment of patronage dividends:

6% Dividend on Common Stock	$ 1,183.20
6% Dividend on Preferred Stock	798.00
Provision for reserve fund—	
5% of $12,848.52	642.43
Provision for educational fund—	
5% of $12,206.09	610.30

X.

The surplus (reserve) of the petitioner as of December 31, 1939, prior to the deduction therefrom of the dividend paid on [16] common stock in the amount of $1,183.20, the payment on preferred stock in the amount of $798.00 and the inclusion therein of the profit or the deduction therefrom of any loss from operations for the taxable year 1939 is the amount of $7,910.18.

XI.

No amount was set aside from current earnings as an addition to the reserve in the taxable year 1939.

No amount has ever been set aside as an educational fund.

XII.

It is agreed that the parties hereto will file, as Exhibit B to this stipulation, a printed copy of the form of preferred stock certificate in use during the taxable year 1939.

J. M. STOTESBURY,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.
Counsel for Respondent.

ACB:mo 9/23/41 [17]

EXHIBIT A

"Whereas, Paragraph six of the original articles of Incorporation of the Gallatin Valley Co-operative Company provide that "The amount of authorized capital stock of said corporation shall be Fifty Thousand Dollars ($50,000.00) all of which shall be common stock and non-assessable, and divided into seven (7) different classes as to par value as follows:

175	shares	of	the	par	value	of	$90.00 each being $15,750.00
24	"	"	"	"	75.00	"	" 1,800.00
25	"	"	"	"	60.00	"	" 1,500.00
50	"	"	"	"	45.00	"	" 2,250.00
150	"	"	"	"	30.00	"	" 4,500.00
250	"	"	"	"	15.00	"	" 3,750.00
2,045	"	"	"	"	10.00	"	" 20,450.00

Total authorized capital stock.....50,000.00"and

It is deemed to the best interests of the corporation that its authorized capital stock be changed; Now Therefore Be It Resolved:

That Paragraph six of the Articles of Incorporation be amended and is hereby amended to read as follows:

"The amount of the Authorized capital stock of said corporation shall be Fifty Thousand Dollars ($50,000.00) divided into Thirty Thousand Dollars ($30,000.00) common stock and non-assessable divided into seven (7) different classes as to par value as follows:

EXHIBIT A—(Cont.)

123	shares	of	the	par	value	of	$90.00	each being $11,070.00
24	"	"	"	"	75.00	"	"	1,800.00
25	"	"	"	"	60.00	"	"	1,500.00
50	"	"	"	"	45.00	"	"	2,250.00
100	"	"	"	"	30.00	"	"	3,000.00
250	"	"	"	"	15.00	"	"	3,750.00
663	"	"	"	"	10.00	"	"	6,630.00

Total authorized common stock.....30,000.00; and

Twenty Thousand Dollars ($20,000.00) of Preferred Stock, consisting of one Class of Two Thousand (2,000) shares of the par value of Ten Dollars ($10.00) per share. Said preferred stock to be non-assessable, non-participating; annual dividends to be cumulative and at the rate of six (6) per centum on the par value. Said preferred stock to be subject to call and redemption at par plus unpaid accumulated dividends at any time by order of the Board of Directors of said corporation. Upon dissolution or liquidation of this corporation said preferred stock shall be retired at par value plus accumulated dividends before any payment is made on common stock." [18]

That the President and Secretary of this corporation be, and they hereby are, authorized to execute and file with the County Clerk and Recorder of the County of Gallatin, and with the Secretary of State of the State of Montana, the proper certificate showing the change in the authorized capital stock of said corporation."

Motion was made by John Paugh, seconded by

EXHIBIT A—(Cont.)

E. J. S. Moore, and unanimously carried that the resolution be adopted as read, it being understood and explained that the preferred stock would be a debt of the Corporation, the dividend to be in the form of interest payable annually regardless of earnings, and that the Board of Directors could issue the said preferred stock as they deemed necessary, and redeem it as the finances of the Corporation permitted.

[Endorsed]: Filed Sep. 23, 1941. [19]

[Title of Board and Cause.]

STIPULATION

Pursuant to paragraph 12 of the Stipulation of Facts heretofore filed in the above-mentioned proceeding, it is stipulated and agreed that the attached form of stock certificate no. 598 is a copy of the form of preferred stock certificate in use by the petitioner during the year 1939.

J. M. STOTESBURY
Counsel for Petitioner.
J. P. WENCHEL,
ACB
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

ACB/mm 10/25/41 [20]

EXHIBIT B

Incorporated Under the Laws of
No. 600 the State of Montana Shares....
GALLATIN FARMERS COMPANY
A Cooperative Association
Authorized Capital—Common $30,000
Preferred $20,000

This Certifies that ..... is the owner of .....
Preferred Shares of the Capital Stock of
Gallatin Farmers Company, Belgrade, Montana
transferable only on the books of the Corporation by the holder hereof in person or by Attorney, upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation.

this ..... day of ..... A. D. 19...

....
Secretary. President.

Shares
$10
Each

[21]

For Value Received, ... hereby sell, assign and transfer unto .....
.....
Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint
.....

EXHIBIT B—(Cont.)

to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated ..... 19...

In presence of

....

Notice. The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular without alteration or enlargement, or any change whatever.

[Endorsed]: Filed Nov. 3, 1941. [22]

Docket No. 107778

[Title of Board and Cause.]

MEMORANDUM OPINION

Arnold: This proceeding involves deficiencies in income taxes for the calendar years 1938 and 1939 in the respective amounts of $99.32 and $413.12. Two issues are presented, namely, (1) whether respondent erred in disallowing a $798 deduction claimed in each year as interest paid or incurred in the course of business, and (2) whether respondent erred in disallowing $3,485.93 as excessive patronage dividends claimed as a deduction by petitioner for 1939. The parties filed a stipulation of facts which we adopt as our findings of fact hereinafter setting forth such portions thereof as are necessary for a determination of the issues presented.

Petitioner is a Montana corporation with its principal place of business at Bozeman, Montana. It filed its income tax returns with the collector of internal revenue for the district of Montana. Its accounts were kept and its tax returns filed on the accrual basis.

Petitioner was incorporated and operates under the provisions of Chapter 38 of the Civil Code of the State of Montana.

During the taxable years petitioner had common stock outstanding as follows:

January 1, 1938	Common stock (par value)	$18,940.00
December 31, 1938	" " " "	19,515.00
December 31, 1938	" " " "	19,495.00

Prior to January 18, 1938 petitioner's authorized capital was $50,000 of common stock divided into seven different classes of varying par values. On the latter date petitioner's stockholders amended the articles of incorporation so as to provide for $30,000 of common stock of the same par values, and $20,000 of preferred stock consisting of one class of 2,000 shares, par value $10 per share. The resolution provided in part as follows:

> * * * Said preferred stock to be non-assessable, non-participating; annual dividends to be cumulative and at the rate of six (6) per centum on the par value. Said preferred stock to be subject to call and redemption at par plus unpaid accumulated dividends at any time by order of the Board of Directors of said corporation. Upon dissolution or liquidation of this

corporation said preferred stock shall be retired at par value plus accumulated dividends before any payment is made on common stock.

* * * * * * * *

Motion was made * * *, and unanimously carried that the resolution be adopted as read, it being understood and explained that the preferred stock would be a debt of the Corporation, the dividend to be in the form of interest payable annually regardless of earnings, and that the Board of Directors could issue the preferred stock as they deemed necessary, and redeem it as the finances of the Corporation permitted.

[23]

Pursuant to said resolution preferred stock was issued during 1938 so that as of December 31, 1938 and 1939 there was preferred stock of the par value of $13,300.00.

The face of the preferred stock certificate reads as follows:

Incorporated Under the Laws of

No. 598 the State of Montana Shares....

GALLATIN FARMERS COMPANY

A Cooperative Association
Authorized Capital—Common $30,000
Preferred $20,000

This Certifies that ..... is the owner of ..... Preferred Shares of the Capital Stock of Gallatin Farmers Company, Belgrade, Montana transferable only on the books of the Corporation

by the holder hereof in person or by Attorney, upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation.

this ..... day of ..... A. D. 19...

....

Secretary. President.

Shares
$10
Each

Superimposed on the face of the certificate in large red letters is the word "Preferred". The back of the certificate reads as follows:

For Value Received, ... hereby sell, assign and transfer unto .....

.....

Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

.....

to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated ..... 19...

In presence of

....

During each of the taxable years there was paid the preferred stockholders $798.00, which amount was deducted on the return for each year as interest paid. Said deductions were disallowed by respondent on the ground that such sums constituted dividends.

At the end of the calendar year 1939 petitioner accrued on its books as patronage dividends the sum of $14,860.30 which was paid subsequent to December 31, 1939.

During 1939 petitioner declared and paid out of prior years' earnings the sum of $1,183.20, which was a 6 per cent dividend on the common stock for the year ended December 31, 1939.

Petitioner's income for 1939 after deducting the $798.00 paid on preferred stock was $14,031.72. Respondent adjusted petitioner's net income to $14,829.72 by disallowing the claimed deduction of $798.00. From the net income as so adjusted respondent held that provision must be made for the following amounts before the payment of patronage dividends:

6 per cent dividend on common stock	$ 1,183.20
6 per cent dividend on preferred stock	798.00
Provision for reserve fund	
5 per cent of $12,848.52	642.43
Provision for educational fund	
5 per cent of $12,206.09	610.30

The surplus (reserve) of the petitioner as of December 31, 1939, prior to the deduction therefrom of the common stock dividend of $1,183.20, the pay-

ment on preferred stock of $798.00 and the inclusion therein of profit or deduction therefrom of any loss from operations for 1939 is the amount of $7,910.18. [24]

No amount was set aside from current earnings as an addition to the reserve in 1939.

No amount has ever been set aside as an educational fund.

The first issue is whether the payments made during the taxable years on petitioner's "preferred stock" were payments of dividends or interest. Petitioner contends that actually a debt was created and the payments were interest payments. Petitioner cites and relies upon Commissioner v. Proctor Shop, Inc., 82 Fed. (2d) 792, affirming 30 B. T. A. 721, and Arthur R. Jones Syndicate v. Commissioner, 23 Fed. (2d) 833.

We have carefully weighed and considered the evidence adduced and petitioner's argument and authorities, but we are not convinced that the preferred stock issue represented an indebtedness. The issuance of preferred stock was a method, authorized by Montana law, as hereinafter shown, whereby petitioner was able to obtain funds for the enterprise without borrowing money or contracting a debt, the stockholder being preferred as to principal and dividends but without voice in the management of the corporation. Elko Lamoille Power Co. v. Commissioner, 50 Fed. (2d) 595; Finance & Investment Corporation v. Burnet, 57 Fed. (2d) 444.

Petitioner was organized under Chapter 38 of the

Civil Code of Montana, section 6381 of which (Revised Codes of Montana, 1935) authorizes cooperative associations to divide their capital stock into shares of preferred and common. Said section provides that the holders of preferred stock shall have no voting power and shall not participate in the management and affairs of the association, but it also provides that the owners of preferred stock "shall share in the profits of the association to the extent of not exceeding six percent (6%) per annum on the par value thereof." (Emphasis supplied.) This petitioner had "profits of the association" available for preferred dividends in excess of $798 per year, since it is stipulated that $1,183.20 was paid on common in 1939 out of prior years' earnings and that 1939 net income, after deducting the $798 paid on preferred, amounted to $14,031.72. Therefore, the distributions to preferred stockholders in each taxable year would be "dividends" within the meaning of the taxing statute, section 115 (a), Revenue Act of 1938, and would be "profits of the association" within the meaning of the Montana Civil Code, section 6381, supra.

We can find no word, phrase or figure in the preferred stock certificate which supports petitioner's contention that the amounts paid preferred stockholders were interest payments. Neither the amendment of the articles of incorporation nor the preferred stock certificates indicate anything out of the ordinary and usual relation in the issuance of preferred stock. The certificates recite on their face

that petitioner's authorized capital is $30,000 common and $20,000 preferred, that the party whose name appears on the face is the owner of a stated number of preferred shares of petitioner's capital stock which is transferable on the books of the petitioner by the holder or his attorney in the usual manner. On the back of the certificate appears the usual form for endorsement over of the certificate. In our opinion any holder or transferee of the certificate would be justified in believing that said certificate was what it purported to be, namely, a certificate of preferred stock, and he would not be put on notice by the certificate that it evidenced any indebtedness of the petitioner. Obviously, if he were a preferred stockholder he was not a creditor of the petitioner. Elko Lamoille Power Co. v. Commissioner, supra.

The evidence which petitioner emphasizes is that portion of the minutes which reads as follows: "it being understood and explained that the preferred stock would be a debt of the Corporation, the dividend to be in the form of interest payable annually regardless of earnings, * * *." This evidence stands alone in support of petitioner's contention. Its significance can be measured by the fact that no such provision appears in the charter amendment or in petitioner's by-laws. Petitioner has advanced no other reason why the preferred stock issue should be considered a loan or security for a loan. Furthermore, if an indebtedness was intended there should be a fixed date at which the indebtedness would ma-

ture, but the redemption of the preferred stock here was entirely at the option of the directors who could issue the stock as they deemed necessary and redeem it at any time.

The Board has considered this question with respect to other cooperative enterprises and has held that amounts paid on so-called preferred stock were dividends rather than interest. The Trego County Cooperative Association, 6 B. T. A. 1275; The Farmers Cooperative Association, 5 B. T. A. 61; Sacred Heart Cooperative Mercantile Co., 2 B. T. A. 24. See also Greensboro News Company, 31 B. T. A. 812. On this issue respondent's determination is approved.

The second issue is whether respondent erred in disallowing $3,485.93 of the deduction for patronage dividends claimed by petitioner for 1939. The issue, as presented, is equivalent to a request that we increase the deduction for patronage dividends by $3,485.93 over the amount allowed by respondent. In Co-Operative Oil Ass'n. Inc. v. Commissioner, 115 Fed. (2d) 666, the Circuit Court of Appeals for the Ninth Circuit considered and denied a similar request except that the taxpayer there had earned but had not distributed the "patronage dividends" to its members. We think the fact that the patronage dividends here were subsequently distributed is insufficient to distinguish this proceeding from the rule laid down by the Ninth Circuit as follows:

> Petitioner makes no attempt to show that it is the object of legislative grace by pointing to a statute authorizing the deduction. The Con-

> gress has not legislated the deduction, and the courts can not usurp that function. Whether respondent [Commissioner of Internal Revenue] should have allowed the deduction he did not allow is a question upon which we express no opinion.

In view of this authority it is immaterial how respondent determined the deduction he would allow for patronage dividends. It is sufficient for present purposes that we can find no statutory authority for increasing the deduction that respondent has allowed.

Decision will be entered for the respondent.

[Seal]

Entered: January 28, 1942. [25]

United States Board of Tax Appeals
Washington

Docket No. 107778

GALLATIN FARMERS COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered January 25, 1942, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1938 and 1939 in the respective amounts of $99.32 and $413.12.

Enter:

(Signed) WILLIAM W. ARNOLD
Member.

Entered Jan. 28, 1942. [26]

[Title of Board and Cause.]

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Gallatin Farmers Company, Petitioner on Review, by its attorneys, J. M. Stotesbury and Norma E. Skarsten, and respectfully shows:

I.

The Petitioner on Review (hereinafter referred to as "Petitioner") is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Bozeman, Montana. The Respondent on Review (hereinafter referred to as the "Commissioner") is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws [27] of the United States.

II.

The nature of the controversy is as follows:

The petitioner contended before the United States Board of Tax Appeals:

(a) That it was entitled to deduct from its gross income, in arriving at its net income for taxation, the sum of $798.00 for both the years ending December 31, 1938, and December 31, 1939, as interest paid or incurred in the course of business, this being the amount paid on so-called preferred stock, which a meeting of the stockholders of the Petitioner had declared to be a debt of the Petitioner. The Board of Tax Appeals failed to find that these amounts were interest, but found that these amounts were dividends on stock, and not deductible from gross income to determine net income for purposes of taxation.

(b) The Petitioner contended before the United States Board of Tax Appeals that it was entitled to deduct the sum of $14,860.30, as patronage dividends, from gross income to arrive at net income subject to income tax. The Commissioner contended that, before determining the amount available for patronage dividends, the petitioner must make provision for the following payments, pursuant to Chapter 38 of the Civil Code of Montana:

6% dividend on common stock	$ 1,183.20
6% dividend on preferred stock	798.00

[28]

Provision for reserve fund, 5% of $12,848.52	642.43
Provision for educational fund, 5% of $12,206.09	610.30

The cause was submitted on an agreed stipulation of facts, whereby it was stipulated that Petitioner's net income, after restoring the $798.00 deducted as interest, was the sum of $14,829.72; that Petitioner accrued as patronage dividends the sum of $14,860.30 at December 31, 1939, which was subsequently paid to patrons.

The Board of Tax Appeals failed to find on this issue at all, and failed to decide the question presented, which is: May the Petitioner deduct as patronage dividends all of its earnings in any year, or must it first provide for dividends on preferred and common stock, reserve fund, and educational fund, out of current years' earnings, before determining the amount available for patronage dividends?

III.

The Petitioner, being aggrieved by the decision of the United States Board of Tax Appeals, desires a review of said decision by the United States Circuit Court of Appeals for the Ninth Circuit, within which Circuit is located the office of the Collector of Internal Revenue with whom Petitioner filed its income tax returns for the years ending December 31, 1938, and December 31, 1939. The decision of the United States Board of Tax Appeals, ordering and deciding that there are deficiencies in income tax for the calendar years 1938 and 1939 [29] in the respective amounts of $99.32 and $413.12, was entered on January 28, 1942.

IV.

The Petitioner says that in the record and proceedings before the United States Board of Tax Appeals, and in the decision rendered and entered by said Board, manifest errors occurred and intervened, to the prejudice of Petitioner, and Petitioner assigns the following errors, and each of them, which, it avers, occurred in said record, proceedings, decision, and final order so rendered and entered by the said United States Board of Tax Appeals, to-wit:

1. The United States Board of Tax Appeals erred by deciding that Petitioner owed an income tax for the year ending December 31, 1938, in the sum of $99.32, by failing to permit Petitioner to deduct interest in the sum of $798.00 paid on the debt represented by preferred stock.

2. The United States Board of Tax Appeals erred by deciding that Petitioner owed an income tax for the year ending December 31, 1939, in the sum of $413.12, by failing to allow the aforesaid deduction of $798.00 for the year ending December 31, 1939, and for failure to allow Petitioner to deduct from gross income the sum of $14,860.30 accrued as patronage dividends payable for the year ending December 31, 1939.

Wherefore, the Petitioner prays that the decision of the United States Board of Tax Appeals entered herein be reviewed by the United States Circuit Court of Appeals for the [30] Ninth Circuit, and

that a transcript of the record be prepared in accordance with law and with the rules of said Court, and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Respectfully submitted,
J. M. STOTESBURY
Bozeman, Montana
NORMA E. SKARSTEN
Bozeman, Montana
Counsel for Petitioner.

(Duly verified.)

[Endorsed]: Filed Apr. 20, 1942. [31]

[Title of Board and Cause.]

PETITIONER'S DESIGNATION OF CONTENTS OF RECORD TO BE CERTIFIED BY CLERK OF THE UNITED STATES BOARD OF TAX APPEALS.

Comes now the Petitioner, having filed its Petition for Review in the above-entitled cause, and designates as the contents of the record to be certified to the United States Circuit Court of Appeals for the Ninth Circuit, the following:

1. The Petition.
2. The Answer.
3. The stipulation of facts, including Exhibits "A" and "B".

4. Memorandum Opinion.
5. Decision.

Dated at Bozeman, Montana, this 16th day of April, 1942.

J. M. STOTESBURY
NORMA E. SKARSTEN
Counsel for Petitioner.

J. M. STOTESBURY
NORMA E. SKARSTEN
P. O. Box 694
Bozeman, Montana.

[Endorsed]: Filed Apr. 20, 1942. [32]

Service of the foregoing Designation of Contents of Record is hereby admitted and agreed to this 28th day of May, 1942.

J. P. WENCHEL,
W
Chief Counsel, Bureau of
Internal Revenue.

[Endorsed]: Filed May 28, 1942. [33]

Docket No. 107778

[Title of Board and Cause.]

CERTIFICATE TO TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages,

1 to 33, inclusive, contain and are a true copy of the transcript of record, pages, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 29th day of May, 1942.

[Seal] B. D. GAMBLE
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 10164. United States Circuit Court of Appeals for the Ninth Circuit. Gallatin Farmers Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed June 15, 1942.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10164

GALLATIN FARMERS COMPANY,
a Corporation,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITIONER'S STATEMENT OF POINTS TO BE RELIED UPON.

Comes now the petitioner on review and adopts as its statement of points to be relied upon on the above entitled appeal, the assignments of error which now appear in the record as a part of the petition to review.

Dated at San Francisco, California, this 20th day of July, 1942.

J. M. STOTESBURY
NORMA E. SKARSTEN
Counsel for Petitioner on Review.

2450 Union Street,
San Francisco, California.

[Endorsed]: Filed Jul. 21, 1942, Paul P. O'Brien, Clerk.

No. 10,164

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GALLATIN FARMERS COMPANY
(a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

J. M. STOTESBURY,
NORMA E. SKARSTEN,
2450 Union Street, San Francisco,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 10,164

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GALLATIN FARMERS COMPANY
(a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

STATEMENT OF JURISDICTION.

On April 2, 1941, the Commissioner of Internal Revenue mailed by registered mail, to Gallatin Farmers Company, petitioner on review, a notice of deficiency, determining a deficiency of income tax for the years ended December 31, 1938 and December 31, 1939, in the sum of $512.44. (T. 3.) In accordance with the provisions of Section 272 (a) (1) I. R. C. the petitioner on review filed on June 9, 1941, a petition with the United States Board of Tax Appeals for a redetermination of the aforesaid deficiency. (T. 1.) On January 28, 1942, decision of the United States Board

of Tax Appeals was duly entered sustaining the determination of the Commissioner of Internal Revenue. (T. 32.) In accordance with the provisions of Section 1141, I. R. C., the petitioner on review on April 20, 1942, filed with the United States Board of Tax Appeals a Petition for Review to the United States Circuit Court of Appeals for the Ninth Circuit seeking to have said Circuit Court of Appeals review the decision of the said Board entered on January 28, 1942. (T. 32, 36.) The return of the tax in question was made to the Collector for the District of Montana. (T. 3; 13.)

STATEMENT OF THE CASE.

Gallatin Farmers Company, the petitioner on review, is a corporation, incorporated and operating under the provisions of chapter 38 of the Civil Code of the State of Montana. (T. 14, 15.) The corporation is a farmers' cooperative. It kept its accounts and filed its tax returns on the accrual basis. There was issued and outstanding during the years in question, so-called preferred stock in the principal sum of $13,300.00, the holders of which were paid $798.00 in each of said years, said sums being claimed by petitioner on review as interest paid, and as such were deducted from gross income. (T. 15.) This deduction the Commissioner disallowed. (T. 8.)

In the year ended December 31, 1939, petitioner accrued patronage dividends in the sum of $14,860.30 which sum was paid subsequent to the close of the

taxable year. (T. 16.) The Commissioner disallowed as deductions a portion of the aforesaid accrual of patronage dividends upon the theory that the petitioner must first, out of current year's earnings provide for dividends on common stock, dividends on preferred stock, provision for reserve fund, and provision for educational fund, and the remainder, if any, to be available for patronage dividends. (T. 16.)

The 6% dividend on common stock for the calendar year 1939 was declared and paid out of prior years' earnings. (T. 16.)

The net income of petitioner for the calendar year 1939, after deduction of the 6% dividend on the preferred stock was $14,031.72. (T. 16.)

The case was submitted upon an agreed stipulation of facts. (T. 14, 22.)

The two questions presented to the United States Circuit Court of Appeals are

(a) Is the payment of $798.00 for each of the years 1938 and 1939 a payment of interest on a debt or the payment of a dividend on capital stock?

(b) May a cooperative in Montana organized and operating under the provisions of Chapter 38 of the Civil Code of Montana pay out all of its earnings as patronage dividends, or is it mandatory under the law that the payment of dividends on common stock and additions to the reserve fund and educational fund be first provided for from current year's earnings?

SPECIFICATION OF ERRORS.

The petitioner on review adopted as its statement of point to be relied on, the assignments of error appearing in the petition for review. (T. 39.)

These are as follows:

1. The error of the United States Board of Tax Appeals in failing to allow the petitioner on review to deduct as interest the sum of $798.00 during each of the years 1938 and 1939, paid on the debt represented by preferred stock.

2. The error of the United States Board of Tax Appeals in refusing to allow the petitioner to deduct from gross income the sum of $14,860.30 accrued as patronage dividends payable for the year ended December 31, 1939.

ARGUMENT.

The important question involved in this case is the question of the amount the cooperative may declare as patronage dividends. There is no question here as to the amount which was accrued. In paragraph VII of the stipulation of facts, appearing at page 16 of the Transcript of the Record the following appears:

> "That there was accrued on the books of the petitioner as patronage dividends at the end of the calendar year 1939 the sum of $14,860.30 which sum was paid subsequent to the close of the taxable year 1939."

The net income for 1939, before any dividends or additions to reserve or educational funds, was $14,-829.72. (T. 16.)

The deficiency here asserted was arrived at by holding that the petitioner must first, out of current earnings, pay the dividend on common stock $1183.20, the dividend (or interest) on preferred stock $798.00, a provision for reserve fund $642.43 and a provision for educational fund $610.30. (T. 16.) (T. 11.)

The petitioner, however, paid its dividend on common stock out of a prior year's earnings (T. 16) and did not set aside any amount as an addition to reserve or as an educational fund. (T. 17.)

The Board of Tax Appeals in its opinion relies on *Cooperative Oil Ass'n, Inc. v. Commissioner of Internal Revenue,* 115 Fed. (2d) 666, but petitioner feels that that case is not at all to be construed in the way the Board has done. The question in the case here on appeal is as to whether the Law of the State of Montana required the allocation of income contended for by the Commissioner or whether that allocation was permissive. Nothing was stated by the Board as to this question.

It has been held for so long a period that patronage dividends are a proper deduction from gross income, that it is not considered necessary to burden the brief with citations as to that point.

There is also no dispute here involving the question of whether the patronage dividends were a liability or not. It is stipulated that they were accrued and paid.

The sole question is the construction of the Montana Statute and that has not been touched on by the Board of Tax Appeals.

The pertinent section of Chapter 38 of the Civil Code of Montana (Section 6387 Revised Codes of Montana, 1935) is as follows:

> "The directors of a co-operative association, subject to revision by the stockholders at a general or special meeting, may apportion the earnings of the association by first paying dividends on the paid up capital stock, not exceeding six per cent. (6%) per annum on the par value thereof, from the remaining funds, if any, accessible for dividend purposes, not less than five per cent. (5%) of the net profits for a reserve fund until an amount has accumulated in said reserve fund amounting to thirty per cent. (30%) of the paid up capital stock, and from the balance, if any, five per cent. (5%) for educational fund to be used for teaching cooperation, and the remaining of said profits, if any, by uniform dividends upon the amount of purchases of patrons, and upon the wages and for salaries of employees, the amount of such uniform dividends on the amount of their purchases, which may be credited to the account of such patrons on account of capital stock of the association; but in production associations such as creameries, canneries, elevators, factories, and the like, dividends shall be on raw material delivered instead of on goods purchased. In case the association is both a selling and a productive concern, the dividends may be on both raw material delivered, and on goods purchased by patrons."

The Commissioner, in asserting his deficiency, has interpreted the foregoing provision of the Montana law to be mandatory. If this section is to be construed as mandatory, then the Court must place other than the plain meaning on the words used. The statute says the Directors *may* do certain things, unless a different policy is adopted by the stockholders, at a general or special meeting. The statute is a guide, and a limitation on the directors. They *may* declare 6% on common stock, they *may* add to the reserve fund until 30% of the capital stock is reached and they *may* provide for an educational fund. If the Court were to assume that the legislators did not know the use of words, the Commissioner's construction might be followed, but this view cannot be justified as in the same section the legislature says "* * * in production association, * * * dividends *shall* be on raw material delivered."

The Montana Supreme Court has only had one occasion to touch upon this question. In that opinion it was said in the special concurring opinion by Chief Justice Johnson:

> "Except for limited authorized application to dividends on capital stock and the establishment of a reserve fund and an educational fund, any and all excess of receipts over the usual operating outlays is mandatorily required paid."
>
> *Gallatin Farmers Co. v. Shannon, et al.*, 109 Mont. 155, 93 Pac. (2d) 953.

There again the permissive and the required are segregated. The Chief Justice states that except for

authorized dividends and additions to reserves, all excess of receipts over the usual operating outlays, is *mandatorily* required paid (as patronage dividends).

The argument here must be directed to the Commissioner's determination as the opinion and decision of the Board is silent on the question involved, other than to sustain the Commissioner. It would seem the Board is asking for statutory authority for the deduction of patronage dividends, where none exists (T. 31) and overlooks the fact that patronage dividends are but a rebate or discount on purchases, and as such have uniformly been held to be a deduction from gross income. *Fruit Growers Supply Co. v. Commissioner,* 21 B. T. A. 315, 326, affirmed 56 Fed. (2d) 90, 10 A. F. T. R. 1277.

Petitioner contends that there is nothing in the Montana law prohibiting the payment of all the net income as patronage dividends or rebates, and this is just what has been done. Stipulation VII in the stipulation of facts (T. 16) so states.

If we adopt another theory and state, but do not admit, that Montana law is mandatory as to the dividends and reserves contended for by the Commissioner, the fact remains that petitioner *did* pay out all of its net profit in 1939 as patronage dividends, therefore it could have no taxable income for such year, unless the Court should hold that $798.00 paid to so-called preferred stockholders, was a dividend and not interest.

The other point relied upon in this appeal is the question of the legal effect of the preferred stock. The

wording on the certificate itself (T. 21, 22) and the amendment of the charter to authorize the issue (T. 19) would indicate that this was an issue of preferred stock and nothing else. If such alone were the case, petitioner would concede that the payment of the $798.00 to preferred shareholders, was a dividend. However, a certificate of stock constitutes a contract between the corporation and the shareholder. As in any other contract, the parties themselves are entitled to place their own construction on it. The motion adopting the resolution creating the preferred stock, according to the minutes of the stockholders' meeting read as follows:

> "Motion was made by John Paugh, seconded by E. J. S. Moore, and unanimously carried that the resolution be adopted as read, it being understood and explained that the preferred stock would be a debt of the Corporation, the dividend to be in the form of interest payable annually regardless of earnings, and that the Board of Directors could issue the said preferred stock as they deemed necessary, and redeem it as the finances of the Corporation permitted."
>
> (Transcript of the Record 19, 20.)

The question on the intent of the parties has been covered by our Courts, in the following words:

> "If it be shown that dividends paid are, according to the intent of the parties, in fact interest, and the stock on which the dividends are paid is merely held by the creditor as security, it makes no difference what the reason was for paying in that form. The courts look to the real character

of the payment, and construe the statute liberally in favor of the taxpayer."

Commissioner of Internal Revenue v. Proctor Shop, 82 F. (2d) 792.

The Montana statute by law takes away part of the usual character of preferred stock in this class of corporation.

"The holders of preferred stock shall have no voting power and shall not participate in the management and affairs of the association * * *"

Sec. 6381, *Revised Codes of Montana,* 1935.

In another case the Court has gone beyond the face of the transaction to determine the true facts.

"We therefore conclude that a taxpayer who borrows money at a usurious rate of interest and who, to conceal the usury, is compelled to execute a document which does not correctly describe the relationship of the parties, may, as against the government, disclose the true relationship of debtor and creditor. Sums paid by it as interest regardless of the name by which it is called, may be deducted by the taxpayer from its income."

Arthur R. Jones Syndicate v. Commissioner, 23 F. (2d) 833.

We return for a moment to the decision of the Board of Tax Appeals, using as authority *Cooperative Oil Association, Inc. v. Commissioner.* In that case the question was not the same. There, a portion of the earnings were placed in a reserve and were not set aside subject to the demand of the patrons. In this

case it is stipulated that the amount in question was accrued and subsequently paid. (T. 16.) The issue here is whether, in the face of Montana law, the petitioner could declare the amount it did. The Commissioner of Internal Revenue in that case set out the practice in his brief, which is quoted by the Court as follows:

> "The situation is fully set forth by the following quotation from respondent's brief which is unchallenged by petitioner: 'There is no express statutory provision permitting the deduction of so-called patronage dividends by corporations subject to taxation. The administrative practice, however, has been to permit cooperative associations, even though not exempt from taxation, to deduct from gross income the amount returned to their patrons, whether members or non-members, upon the basis of the purchases or sales, or both, made by or for them. This is upon the theory that a cooperative association is organized for the purpose of furnishing its patrons goods at cost or for obtaining the highest market price for the produce furnished by them.' "
>
> *Cooperative Oil Ass'n, Inc. v. Commissioner of Internal Revenue,* 115 F. (2d) 666.

It is submitted, that this Court must hold that the Board of Tax Appeals erred as complained of by the Petitioner on Review and;

1. That the relation of debtor and creditor exists between the Gallatin Farmers Company and its holders of preferred stock and that the payments to said preferred shareholders consti-

tute interest paid and as such are deductible from gross income; and

2. That the Gallatin Farmers Company did in fact accrue and pay $14,860.30 as patronage dividends or rebates for the calendar year 1939 and by such action, had no taxable net income for the said year.

Dated, San Francisco,
August 31, 1942.

Respectfully submitted,
J. M. STOTESBURY,
NORMA E. SKARSTEN,
Counsel for Petitioner.

No. 10164

In the United States Circuit Court of Appeals for the Ninth Circuit

GALLATIN FARMERS COMPANY, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
A. F. PRESCOTT,
MAMIE S. PRICE,
Special Assistants to the Attorney General.

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CITATIONS

486708—42——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10164

GALLATIN FARMERS COMPANY, A CORPORATION
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 22–31) is not officially reported.

JURISDICTION

This petition for review (R. 32–36) involves federal income taxes for the taxable years 1938 and 1939. On April 2, 1941, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of $512.44. (R. 5–6.) Within ninety days thereafter and on June 9, 1941, the taxpayer filed a petition with the Board of Tax Appeals for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 1, 3–5.) The decision of the Board of Tax Appeals sustaining

the deficiency was entered on January 28, 1942 (R. 32.) The case is brought to this Court by a petition for review filed April 16, 1942 (R. 32–36), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether the amount of $798 paid by the taxpayer to its preferred stockholders in each of the years 1938 and 1939 represented dividends, or interest on indebtedness deductible by the taxpayer under Section 23 (b) of the Revenue Act of 1938.

2. Whether the Board was correct in disallowing $3,485.93 of the amount claimed by the taxpayer as a deduction for patronage dividends in the year 1939.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447.

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, * * *.
>
> * * * * *
>
> SEC. 115. DISTRIBUTIONS BY CORPORATIONS.
>
> (a) *Definition of Dividend.*—The term "dividend" when used in this title * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out

of the earnings or profits of the taxable year. * * *

* * * * *

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 23 (b)–1. *Interest.*—

* * * * *

So-called interest on preferred stock, which is in reality a dividend thereon, cannot be deducted in computing net income.

Revised Codes of Montana, 1935, c. 38:

SEC. 6379. Powers of such associations. Associations formed under this act shall be bodies corporate and politic for the period for which they are organized * * *. They may borrow money and may pledge their property, both real and personal, to secure the payment thereof, and they shall have and exercise all powers necessary and requisite to carry into effect the objects for which they may be formed, and such as are usually exercised by co-operative associations, subject to all duties, restrictions, and liabilities set forth in the general laws in relation to similar corporations, except so far as the same may be limited or enlarged by this act.

* * * * *

SEC. 6381. Classes of stock—powers of stockholders of preferred and common stock—forfeiture for non-payment of installments. The shares of stock shall not be less than ten dollars ($10.00) nor more than five thousand dollars ($5,000.00) per share, and may be made payable in installments. Every co-operative association may divide its shares of stock into preferred and

> common stock. The holders of preferred stock shall have no voting power and shall not participate in the management and affairs of the association, and the owners thereof shall share in the profits of the association to the extent of not exceeding six per cent. (6%) per annum on the par value thereof. The common stock may be divided into classes of different values, and the owners thereof shall share in the profits of the association in proportion to the par value of their shares; provided, however, that the owners of said common stock in the different classes shall have the same power and vote in the association. * * *

STATEMENT

The facts in this case were stipulated (R. 14–22), and are set out by the Board substantially as follows:

The taxpayer was incorporated and operates under the provisions of Chapter 38 of the Civil Code of Montana, with its principal place of business at Bozeman, Montana. (R. 23.) Its authorized capital, prior to January 18, 1938, was $50,000 of common stock divided into seven different classes of varying par values. On that date the stockholders amended the articles of incorporation, so as to provide for $30,000 of common stock of the same classes of varying par values as formerly, and in addition $20,000 of preferred stock consisting of one class of 2,000 shares, par value $10 per share. (R. 23.)

The resolution amending the articles of incorporation provided in part as follows (R. 23–24):

> * * * Said preferred stock to be non-assessable, non-participating; annual dividends to be

cumulative and at the rate of six (6) per centum on the par value. Said preferred stock to be subject to call and redemption at par plus unpaid accumulated dividends at any time by order of the Board of Directors of said corporation. Upon dissolution or liquidation of this corporation said preferred stock shall be retired at par value plus accumulated dividends before any payment is made on common stock.

* * * * *

Motion was made * * *, and unanimously carried that the resolution be adopted as read, it being understood and explained that the preferred stock would be a debt of the Corporation, the dividend to be in the form of interest payable annually regardless of earnings, and that the Board of Directors could issue the preferred stock as they deemed necessary, and redeem it as the finances of the Corporation permitted.

Preferred stock was issued during 1938 pursuant to this amendment so that as of December 31, 1938 and 1939, there was perferred stock in the par value of $13,300. (R. 24.) The face of the preferred stock certificates read as follows (R. 24–25):

GALLATIN FARMERS COMPANY

A COOPERATIVE ASSOCIATION

AUTHORIZED CAPITAL—COMMON $30,000

PREFERRED $20,000

This Certifiies that _____ is the owner of ____ Preferred Shares of the Capital Stock of Gallatin Farmers Company, Belgrade, Montana transferable only on the books of the Corporation

by the holder hereof in person or by Attorney, upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation this ____ day of ______ A. D. 19__

---------- ----------

Secretary. President.

Shares
$10
Each

Superimposed on the face of the certificate in large red letters is the word "Preferred". The back of the certificate reads as follows:

For Value Received, ____ hereby sell, assign, and transfer unto----------

---

Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint ----------
to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated ______ 19__

In presence of

---------- ----------

During each of the taxable years, 1938 and 1939, the taxpayer paid to its preferred stockholder the sum of $798, which amount was deducted on its income tax return for each year as interest paid. These deductions were disallowed by the Commissioner on the ground that such sums constituted dividends and not interest. (R. 26.)

During 1939 the taxpayer declared and paid, out of prior years' earnings, a 6% dividend on its common stock for the year 1939, totaling $1,183.20. (R. 26.)

The taxpayer reported an income for 1939, after deducting the $798 paid on its preferred stock, of $14,031.72. The Commissioner disallowed the claimed deduction of $798 and adjusted the income to $14,829.72. The Commissioner further held that before payment of patronage dividends the taxpayer must make provision for the following amounts (see Sec. 6381 of Revised Codes of Montana, 1935, *supra*) (R. 26):

6 per cent dividend on common stock	$1,183.20
6 per cent dividend on preferred stock	798.00
Provision for reserve fund	
5 per cent of $12,848.52	642.43
Provision for educational fund	
5 per cent of $12,206.09	610.30

The surplus (reserve) of the taxpayer as of December 31, 1939, prior to the deduction therefrom of the common stock dividend of $1,183.20, the payment on preferred stock of $798 and the inclusion therein of profit or deduction therefrom of any loss from operations for 1939, is the amount of $7,910.18. (R. 26–27.)

No amount was set aside from current earnings in 1939 as an addition to the reserve, and no amount has ever been set aside as an educational fund. (R. 27.)

The Board of Tax Appeals sustained the Commissioner's determination of deficiencies for the years 1938 and 1939 (R. 32), and the taxpayer brings the case to this Court for review.

SUMMARY OF ARGUMENT

Whether preferred stock of a corporation represents "indebtedness" or an interest in the corporation de-

pends upon the facts in each case. The terms "dividend" and "preferred stock" are not conclusive, but they are significant in determining the purpose of the parties using them. "Interest" as used in Section 23 (b) means the sum which is paid for the use of borrowed money.

The instruments here were called "preferred stock" and have the other usual indicia of stock certificates rather than certificates of indebtedness. The statute of Montana under which the taxpayer was incorporated permitted it to borrow money without the necessity of revamping its capital structure and issuing preferred stock. The issuance of preferred stock is a common method by which a corporation obtains necessary funds without incurring a debt.

Section 115 (a) defines the term "dividend" to mean any distribution made by a corporation to its stockholders out of its earnings or profits. The payments to the preferred stockholders here meet that definition, and also the requirement of the Montana statute that preferred stockholders shall share in the profits of the association. The stock certificates provided that the dividends should be "cumulative," further indicating they were to be made only from earnings and profits. The stock certificates in this case had no fixed maturity date, but were subject to the usual corporate process of call and redemption at any time by order of the board of directors.

The taxpayer has not pointed to any revenue statute authorizing any deduction whatever for patronage dividends; neither has it shown that the administrative

officer, within whose discretion such deductions have been permitted, may not require the corporation to comply with state statutory plans for reserves before such deductions are allowed. Whether and to what extent deductions shall be allowed depends upon legislative grace, and only as there is clear provision therefor can any particular deduction be allowed.

ARGUMENT

I

The amounts paid to its preferred stockholders by the taxpayer during the taxable years were dividends and not interest

Section 23 (b) of the Revenue Act of 1938, *supra,* allows a corporation in computing its net income to deduct all interest paid or accrued within the taxable year on indebtedness. So-called interest on preferred stock, which is in reality a dividend thereon, cannot be deducted in computing net income. Art. 23 (b)–1 of Treasury Regulations 101, *supra; Pacific Southwest R. Co.* v. *Commissioner,* 128 F. 2d 815, 817 (C. C. A. 9th). The taxpayer in this case is claiming a deduction for the taxable years 1938 and 1939, of the amounts paid its preferred stockholders during those years, on the theory that the certificates represented indebtedness. The Government takes the position that the certificates were what they purported to be, preferred stock certificates, and that the payments in question were dividends.

Various factors, no particular one of which can be said to be controlling, have been considered by the courts in arriving at a determination of whether pre-

ferred stock of a corporation may represent "indebtedness" within the meaning of the Revenue Act so that a corporation is entitled to a deduction for interest in the amount of the dividends paid. Each case depends upon its own particular facts. *Commissioner* v. *Schmoll Fils Associated,* 110 F. 2d 611 (C. C. A. 2d).

While the use of terms "dividends" and "preferred stock" is not conclusive, nevertheless when such terms are used it cannot be inferred that they have been improperly used unless there is clear and convincing evidence to that effect. As stated in *Matthews* v. *Bradford,* 70 F. 2d 77, 78 (C. C. A. 6th):

> "While the designating of securities as preferred stock is not conclusive upon the status of the holder, yet what the parties in a given case have called the subject of the contract is of no little significance in determining their purpose, and, where the purpose authorized and the purpose declared is an issue of stock and not the creation of a debt, the intention to create a debt should be clear and convincing; * * *."

The term "interest" as used in Section 23 (b), means the sum which is paid for the use of borrowed money. *Deputy* v. *duPont,* 308 U. S. 488; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552. Thus, in order to show that the taxpayer paid interest within the meaning of the revenue statutes to the holders of its preferred stock, it must necessarily appear that such holders had loaned the taxpayer money and that there was a debtor-creditor relationship, instead of one arising by reason of an investment in a corporation.

In the instant case the designation of the certificates in question was plainly and unqualifiedly "preferred

stock." As pointed out by the Board, there was nothing in the amendment of the articles of incorporation nor in the preferred stock certificates themselves to indicate they were anything except what they were called and what they purported to be. The certificates on their face contain the usual recitals of the amount and type of the taxpayer's authorized capital stock, that the party whose name appears on the face is the owner of a stated number of preferred shares of the stock, and that the stock was transferable on the books of the taxpayer in the ordinary manner. On the back of the certificate appears the usual form of endorsement over of the certificate. Further, these certificates met every requirement for preferred stock under Section 6381 of the Revised Codes of Montana, 1935, *supra.* That section authorizes cooperative associations to divide their capital stock into shares of common and preferred, the par value of the preferred to be not less than $10. It also provides that the holders of preferred stock shall have no voting power and shall not participate in the management and affairs of the association, but also provides that the owners of the preferred stock "shall share in the profits of the association to the extent of not exceeding six percent (6%) per annum on the par value thereof." (R. 28.) It seems clear that a stockholder, rather than a creditor, relationship was contemplated throughout the transaction here.

Section 6379 of the Revised Codes of Montana, 1935, *supra,* authorized cooperative associations to borrow money and pledge their property to secure the payment thereof, and to exercise all powers necessary and requi-

site to carry into effect the objects for which they were formed. It does not appear, then, that it would have been necessary for the taxpayer to amend its articles of incorporation and go through the formality of revamping its capital structure and issuing preferred stock, if its only purpose was to borrow money and create a debtor-creditor relationship.

The issuance of preferred stock is, of course, a common means by which a corporation obtains property or funds for its enterprises without borrowing money or incurring a debt. As was stated by this Court in *Elko Lamoille Power Co.* v. *Commissioner,* 50 F. 2d 595, 596:

> A preferred stockholder is a mode by which a corporation obtains funds for its enterprise without borrowing money or contracting a debt, the stockholder being preferred as to principal and interest, but having no voice in the management. * * * It differs only from other stocks in that it is given preference and has no voting right. A preferred stockholder is not a creditor of the company.

In Section 115 (a) of the Revenue Act of 1938, *supra,* Congress defined the term "dividend" to mean any distribution made by a corporation to its stockholders out of its earnings or profits. Interest may be paid from *any* assets of a corporation. The payments in question here were made out of earnings or profits of the corporation. It was stipulated that $1,183.20 was paid on common stock in 1939 "out of prior years' earnings" (R. 16), and that the 1939 net income, after deducting the $798 paid on the preferred, was in excess of

$14,000. The payments to the preferred stockholders in this case therefore meet the definition of "dividends" in the revenue statutes. They also meet the provisions of the Montana statute that preferred stockholders shall share in the "profits of the association" not exceeding 6% per annum of the par value, which was the exact amount that was paid to the preferred stockholders in this case.

Another fact tending to prove that payments here were to be made only out of earnings is the statement in the resolution of the taxpayer corporation authorizing the issuance of preferred stock to the effect that annual dividends thereon should be "cumulative." (R. 23.) As ordinarily used in connection with corporate distributions on preferred stock, the word "cumulative" means that if in any one year there are insufficient *earnings* to pay the amounts stipulated to be paid, they are to be paid in a subsequent year or years out of earnings, if any, before dividends are paid on common stock. If the word "cumulative" had been left out it would have been indicative of an intention to pay the preferred stockholders out of any assets, regardless of earnings. Its inclusion tends to prove the contrary.

Finally, there was no fixed date of maturity for the preferred stock certificates in this case. This is additional evidence that the owners of the certificates were stockholders of the corporation and not creditors. In *Brown-Rogers-Dixson Co.* v. *Commissioner,* 122 F. 2d 347, 350 (C. C. A. 4th), it was stated:

> There was no due or maturity date fixed for the payment of the principal. It has been re-

peatedly held that one of the fundamental characteristics of a debt is a definite determinable date on which the principal falls due. *Elko Lamoille Power Co.* v. *Commissioner,* 9 Cir., 50 F. 2d 595; *Commissioner* v. *Proctor Shop,* 9 Cir., 82 F. 2d 792; *Dayton & Michigan R. Co.* v. *Commissioner, supra; United States* v. *South Georgia Ry. Co.,* 5 Cir., 107 F. 2d 3; *Commissioner* v. *Schmoll Fils Associated,* 2 Cir., 110 F. 2d 611.

In the *South Georgia* case the Court stated: "* * * There is, thus, an entire absence of the most significant, if not the essential feature of a debtor and creditor as opposed to a stockholder relationship, the existence of a fixed maturity for the principal sum with the right to force payment of the sum as a debt in the event of default."

The preferred stockholders here had no rights to demand payment at any particular time. The stock was subject to the usual corporate process of call and redemption at any time by order of the board of directors of the corporation.

The taxpayer admits (Br. 9) that the wording on the certificates and the amendment to the charter authorizing the issue would indicate that this was an issue of stock and nothing else. The only evidence presented by the taxpayer in suppport of its contention that the certificates represented an "indebtedness" is a notation in its minutes reading (R. 24) "it being understood and explained that the preferred stock would be a debt of the Corporation, the dividend to be in the form of interest payable annually regardless of earnings, * * *." In *Elko Lamoille Power Co.* v. *Commis-*

sioner, supra, the preferred stock of the taxpayer was sold on oral representation that the holders could return it at any time and receive the amount paid together with accumulated dividends. Upon refusal of the revenue officers to recognize the preferred stock as a debt and the dividends thereon as interest, the corporation adopted a formal resolution ratifying and confirming the oral representations with respect to redemption, and declaring the certificates of preferred stock to be certificates of indebtedness. This Court held the collateral agreement between the officers and the stockholders, and the resolution passed after the sale of the preferred shares had no probative value, and rejected the taxpayer's contention that its preferred stock represented an indebtedness of the corporation, quoting (p. 597) from *Warren* v. *King,* 108 U. S. 389, 396: "The rights of the holders of preferred stock in this case must be determined by the language of the stock certificates."

The taxpayer relies on the cases of *Commissioner* v. *Proctor Shop,* 82 F. 2d 792 (C. C. A. 9th), and *Arthur R. Jones Syndicate* v. *Commissioner,* 23 F. 2d 833 (C. C. A. 7th), in support of its contention that its preferred stock certificates represented indebtedness. The findings in those cases on the whole evidence showed the real intent of the parties to be the creation of a debtor-creditor relationship; and in further evidence of this fact there was a fixed redemption date for the shares in each case. In the *Proctor Shop* case, in order to avoid affecting the credit of the corporation there was issued "debenture preference stock" for the amounts advanced to the corporation by one who was unwilling to

become an investor in it. In the *Arthur R. Jones Syndicate* case, it was definitely shown that the reason for calling the instruments "preferred stock" was to avoid a usury statute.[1]

In the instant case there was no evidence of any necessity to create a debtor-creditor relationship rather than stockholder; there was no usury law to be avoided, and nothing whatever to indicate anything out of the ordinary and usual relation in the issuance of the preferred stock. The taxpayer has presented no testimony of holders of the certificates to indicate they considered themselves creditors rather than stockholders. There is no showing that the payments were carried on taxpayer's books as interest payments rather than dividends. In the absence of such evidence it must be assumed taxpayer had none to offer.

It is therefore submitted that the taxpayer has failed to show that the preferred stock certificates here were anything other than what they purported on their face to be, or that the payments to the holders of these certificates were anything other than dividends. The claimed deduction should therefore be denied. *Elko Lamoille Power Co.* v. *Commissioner, supra; In re Culbertson's,* 54 F. 2d 753 (C. C. A. 9th).

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[1] We question the correctness of the *Arthur R. Jones Syndicate* case. There the contract took its form in order to avoid a usury statute. If the payments there had been interest, they would have been usurious and there would have been no obligation to pay. Hence they would not have been deductible. The corporation was obligated to make the payments only if they were in fact dividends.

II

The Board was correct in disallowing the additional deduction claimed by the taxpayer for patronage dividends for 1939

During the year 1939 the taxpayer accrued on its books as patronage dividends the sum of $14,860.30, which was paid subsequent to December 31, 1939. The Commissioner disallowed $3,485.93 of this amount as excessive, holding that before patronage dividends were paid provision must be made for dividends on common and preferred stock, for the reserve fund and for an educational fund, in accordance with the percentages outlined in the Montana statute under which the taxpayer was incorporated. (R. 26; taxpayer's Br. 6.) The taxpayer contends it is entitled to deduction of the entire amount claimed as patronage dividends.

As plainly stated by this Court in *Co-Operative Oil Ass'n.* v. *Commissioner,* 115 F. 2d 666, 668, there is no statutory provision permitting the deduction of so-called patronage dividends, but the *administrative practice* has been to permit cooperative associations, even though not exempt from taxation, to deduct from gross income the amounts returned to their patrons, upon the basis of the purchases or sales, or both, made by or for them.

The findings of the Board indicate the taxpayer had not made provision for common stock dividends for 1939, nor for the reserve fund and educational fund, out of the earnings for that year, in accordance with the plan set out in the Montana statutes relating to corporations of this type. Whether these provisions of the

Montana statute were "permissive" or "mandatory" is not material here. The taxpayer has not pointed to any revenue statute authorizing the deduction claimed; neither has it shown that the administrative officer, within whose discretion such deductions have been permitted, may not require that the plan laid down in the state statute under which the taxpayer was incorporated, be complied with before patronage dividends may be allowed.

The position of the taxpayer here, claiming a greater deduction for patronage dividends than that allowed by the Commissioner, can best be stated by quoting from the opinion of this Court in *Co-Operative Oil Assn.* v. *Commissioner, supra,* p. 668:

> In other words, petitioner points to no statute authorizing any deduction whatever, and we are in effect asked to hold that a practice of respondent permitting a deduction not authorized by statute, is not liberal enough. We know of no manner in which such liberality may be reviewed in this court. It is familiar law that "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed" and "a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms." *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, * * *. See also: *White* v. *United States,* 305 U. S. 281, 292, * * *.

It is therefore apparent that the Board committed no error in denying the taxpayer's claim for this additional deduction.

CONCLUSION

It is respectfully submitted that the decision of the Board is correct and that it should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 10169

United States

Circuit Court of Appeals

For the Ninth Circuit.

FOX WEST COAST AGENCY CORPORATION, a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
Southern District of California
Central Division

No. 1649 (BH) O'C

JEAN L. FORSYTHE,

Plaintiff,

vs.

FOX WEST COAST AGENCY CORPORATION, a corporation, et al.,

Defendants.

STATEMENT OF THE CASE PURSUANT TO RULE 76 OF THE RULES OF CIVIL PROCEDURE

This is an action at law for damages by reason of personal injuries. It was commenced in the Su-

perior Court of the State of California, in and for the County of Los Angeles on December 20th, 1940. The parties to said action are: Jean L. Forsythe, plaintiff vs. Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe Ltd., a corporation, John Doe, Richard Roe and Jane Doe, defendants, as named in the original complaint when filed in said Superior Court. A copy of summons and complaint, while the action was pending in said Superior Court, was served upon the defendant Fox West Coast Agency Corporation, a [1*] corporation.

On June 18th, 1941, pursuant to the provisions of the Judicial Code in such cases made and provided, the above entitled action was, upon petition of defendant Fox West Coast Agency Corporation, a corporation, removed to the District Court of the United States, Southern District of California, Central Division.

On September 8th, 1941, pursuant to a motion made by the plaintiff at said time, an order was made granting the plaintiff leave to file an

AMENDED COMPLAINT.

Said amended complaint alleges in substance, in so far as the plaintiff and defendant Fox West Coast Agency Corporation, a corporation, are concerned, the requisite jurisdictional facts consisting of diversity of citizenship and amount of damages claimed.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

Said amended complaint, in addition to the jurisdictional requirements, alleges, in so far as the defendant Fox West Coast Agency Corporation, a corporation, is concerned, as follows (in substance):

The defendants, Fox West Coast Agency Corporation, a corporation, Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, now and at all times mentioned herein were engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater, which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said theater being located on South Broadway between Ninth and Tenth Streets in the City of Los Angeles, County of Los Angeles, State of California.

On the 24th day of March, 1940, plaintiff paid an admission to the defendants to enter the aforesaid United Artists Theater to view motion pictures and entertainment then and there being displayed by said defendants and that said defendants accepted said admission fee from said plaintiff and said plaintiff thereafter entered said theater; that after entering said theater plaintiff [2] proceeded to a seat among those provided for the patrons of said theater; that at said time and place, due to the careless and negligent manner in which the defendants, and each of them, maintained and operated the seats in the said theater, when plaintiff sat down upon said seat in said theater to view said

picture show as aforesaid, the seat collapsed causing her to be thrown violently to the side and down.

It is stipulated by the parties that if the plaintiff was legally entitled to recover a judgment against the Fox West Coast Agency Corporation, a corporation, she was entitled to judgment in the sum of $2500.00. As no point is to be made in the Circuit Court of Appeals with reference to the nature and extent of the injuries sustained by the plaintiff or with reference to the amount of the damages sustained by the plaintiff if she was legally entitled to recover any judgment whatever, all reference to pleadings and evidence pertaining to the subject matter of damages will be omitted from this statement of the case.

Summons on the amended complaint was issued in the above entitled court on September 10th, 1941, and a copy of said summons and of the amended complaint was duly served upon the Fox West Coast Theatres Corporation, a corporation, on September 15th, 1941.

Within the time allowed by law the defendants Fox West Coast Agency Corporation, a corporation, and Fox West Coast Theatres Corporation, a corporation, filed and argued separate motions to dismiss the said amended complaint, specifying the following grounds, in each motion:

"(1) For an order dismissing the amended complaint as filed herein upon the ground that plaintiff has failed to state a claim upon which relief can be granted.

(2) A motion for a more definite statement of matter which is not averred with sufficient definiteness or particularity to enable the defendant properly to prepare its responsive pleading or [3] to prepare for trial.

That the defects complained of in the motion for a more definite statement of matter which is not averred with sufficient definiteness or particularity to enable the defendant to prepare its responsive pleading or to prepare for trial, are the following:

(a) The amended complaint alleges in paragraph VII: 'That at said time and place, due to the careless and negligent manner in which the defendants, and each of them, maintained and operated the seats in said theater * * * the said seat collapsed causing her to be thrown violently to the side and down,' and said allegation is a conclusion and opinion and is not the allegation of any specific negligent act.

The detail desired is the statement of the negligent act which the plaintiff claims was committed by this defendant with reference to either the maintenance or operation of the seats in the theater and also how or in what manner this defendant operated any seat in the said theater or how or in what manner any specific negligent act in the maintenance or operation of any seat caused the same to collapse.''

The motions were and each thereof was denied and the defendants Fox West Coast Agency Corpo-

ration, a corporation and Fox West Coast Theatres Corporation, a corporation, filed a

JOINT ANSWER TO THE AMENDED COMPLAINT,

within the time allowed by law.

The material substance of said answer to said amended complaint is as follows:

The defendants admit that the defendants Fox West Coast Theatres Corporation, a corporation, and United Artists Theater Circuit, Inc., a corporation, are now and at all times mentioned in the said amended complaint were engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater, which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said theater [4] being located on South Broadway, between Ninth and Tenth Streets, in the City of Los Angeles, County of Los Angeles, State of California.

Defendant Fox West Coast Agency Corporation, a corporation, denies that it was at any time mentioned in plaintiff's amended complaint engaged in the business of operating or maintaining a motion picture theater known as the United Artists Theater, said theater being located on South Broadway, between Ninth and Tenth Streets, in the City of Los Angeles, County of Los Angeles, State of California, and alleges in this behalf that it was merely an agent of the defendants Fox West Coast Theatres

Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation.

Said answering defendants admitted that on or about the 24th day of March, 1940, the plaintiff paid an admission to the defendants, other than the defendant Fox West Coast Agency Corporation, a corporation, *the* enter the United Artists Theater, to view the motion picture and entertainment then and there being displayed by defendants, other than defendant Fox West Coast Agency Corporation, a corporation, and that said defendants, other than the defendant Fox West Coast Agency Corporation, a corporation, accepted said admission fee from said plaintiff and said plaintiff thereafter entered said theater.

All of the defendants denied that they or any of them at any time operated any seat in said theater.

The defendant Fox West Coast Theatres Corporation, a corporation, denied that at any time or place it maintained any seat in a careless or negligent manner or that due to any carelessness or negligence in or about the maintenance of any seat in said theater, said or any seat collapsed or that plaintiff has been damaged as a proximate result of any carelessness or negligence in or about the maintenance or operation of any seat in said theater.

The answering defendants stated in their answer that they were and each thereof was without knowledge or information sufficient to [5] form a belief as to the truth of the averment that "when the

plaintiff sat down upon said seat in said theater to view said picture show as aforesaid, the said seat collapsed, causing her to be thrown violently to the side and down."

The defendant Fox West Coast Agency Corporation, a corporation, denied that it at any time maintained or operated any seat in said theater.

The defendant Fox West Coast Theatres Corporation, a corporation, denied that it was negligent or careless in the maintenance or operation of any seat in said theater or that any negligence or carelessness in the maintenance or operation of any seat in said theater was the immediate or proximate or any cause of any injury received by the plaintiff.

Defendant Fox West Coast Theatres Corporation, a corporation, pleaded a defense predicated upon a claim that the plaintiff's cause of action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure of the State of California, and judgment in the above entitled court was, on this defense, rendered in favor of the said defendant Fox West Coast Theatres Corporation, a corporation.

No service of process was ever had upon the defendant United Artists Theatre Circuit, Inc., a corporation.

As a separate and special affirmative defense the defendant Fox West Coast Agency Corporation, a corporation, alleged that the plaintiff approached a seat in said theater where she intended to sit for the purpose of viewing a certain picture and that

the plaintiff negligently and carelessly failed to inspect or pay any attention to said seat or the condition thereof and negligently and carelessly failed to discover whether the same was or was not in good and sufficient condition and negligently and carelessly failed to ascertain or discover whether the same was or was not loose and negligently and carelessly failed to make any test whatever of [6] said seat and negligently and carelessly permitted her body to come in severe and unusual contact with the parts of said seat and negligently and carelessly caused the said seat to be subjected to an extraordinary and unusual strain and stress and negligently and carelessly forced a portion of her body between the arms of said seat in a manner in which the said seat was not designed to be used and negligently and carelessly caused an extraordinary and unusual strain and stress of the arms of said seat to the sides thereof and away from each side of the plaintiff's body and negligently and carelessly used the arms of said seat for a purpose for which they were not designed in that by forcing her body into the space existing between the arms of said seat, her said body being much wider than such space, she exerted a great and unusual force sidewise against each arm of said seat, at a time when she knew, or should have known, in the exercise of ordinary care, that the arms of said seat were designed solely for the purpose of separating the various occupants of the seats in the theater, one from the other, and for the purpose of arm rests, and the said plain-

tiff, at said time, was an unusually large and unusually heavy woman weighing approximately from 275 pounds to 300 pounds, and negligently and carelessly failed to take into consideration the fact that the seat was, and all of the seats in said theater were, designed to accommodate persons of average bulk and weight and negligently and carelessly failed to control her body and the manner in which she forced her body into said seat and as a proximate result of each of the foregoing, the plaintiff so spread, strained and misused the seat that the same, or some part thereof was caused to break while being used by the said plaintiff, as aforesaid, and if the plaintiff sustained any injury whatever, the same was a proximate result of said negligence and carelessness of the plaintiff, as aforesaid.

As a second and special affirmative defense the defendant Fox West Coast Agency Corporation, a corporation, alleged that at all [7] times mentioned in her amended complaint, the plaintiff was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew, or should have known, that seats in theaters and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theater was designed with the purpose of accommodating a person of the grossly excessive

weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in the United Artists Theater in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risks of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff.

The answer contained a prayer that the plaintiff take nothing by her said amended complaint and that the defendants have judgment for their costs incurred.

The amended complaint was a verified complaint and the joint answer filed by the defendants Fox West Coast Agency Corporation, a corporation, and Fox West Coast Theatres Corporation, a corporation, was likewise verified.

TESTIMONY

The case came on regularly for trial before the trial court sitting without a jury on February 12th, 1942 at 10 A. M.

The plaintiff

JEAN L. FORSYTHE

was the first witness called and sworn. After she had stated her name and the fact that she was the plaintiff in the action, the defendant Fox West Coast Agency Corporation, a corporation, objected to the introduction of any evidence "upon the ground that the amended complaint on file herein [8] fails to state a claim upon which relief can be granted for the reason that under the substantive law of the State of California, which is the only basis of any liability, the amended complaint does not state facts sufficient to predicate any relief thereon, and in particular the complaint fails to allege that there was any latent or hidden danger in or about the premises or that any latent or hidden danger was known to the defendant Fox West Coast Agency Corporation, a corporation, and not known to the plaintiff, and no allegation that, with the existence of a latent or hidden danger known to the defendant Fox West Coast Agency Corporation, there was any failure on the part of the said defendant to give any warning to the plaintiff.

> "I realize that that point has been raised in a motion to dismiss, and the cases relied upon in the motion to dismiss are the same as the defendant relies upon now, particularly

(Testimony of Jean L. Forsythe.)

Harris v. Smith, 44 A. C. A. 759; Colombo v. Axelrod, 45 A. C. A. 515 and Papineau v. Distributors Packing Co. 10 Cal. App. (2d) 558."

The court overruled the objection to the introduction of proof.

Omitting the testimony of the plaintiff with reference to her bodily injuries, pain and suffering, and special expenses incurred, in and about the treatment of her injuries and her loss of wages, she testified, in substance, as follows:

On March 24th, 1940, I visited the United Artists Theater in the City of Los Angeles. The theater is on South Broadway, between Ninth and Tenth Streets, on the west side of the street.

I purchased a ticket and entered the lobby of the theater. An usher took my ticket at the door and I proceeded with the rest of the patrons into the theater. I was not shown where to sit and I chose a seat about eighteen rows from the front of the theater and sat down in the second seat; I lowered the chair part first and as I sat down, the lights being on, the back right side of the seat [9] collapsed and threw me backward. In falling I grabbed the chair in front of me and I yelled, "Oh!"

It was stipulated that Plaintiff's Exhibit No. 1 is a fair representation of the seating arrangement in the theater on March 24th, 1942.

A gentleman sitting in the seat in front of me and one immediately behind me, helped me up and

(Testimony of Jean L. Forsythe.)

I moved forward two rows and sat down in the second seat. At that time the lights had gone out and I sat there,—it might have been half an hour or so; I don't know the exact time.

I was then in pain and so uncomfortable I could not sit there and I got up and got an usherette who was standing in the foyer. The party I referred to as an usherette worked in the theater. She was right out in that foyer there, dressed in an old fashioned southern gown. The name of the picture being displayed at that time was "Gone With the Wind". All of the other girls were dressed in similar dresses to advertise the picture. They were standing around, looking pretty. I did not see them take any person to any part of the theater.

Then I talked to a gentleman in the office of the theater. I made a written report in the office of the theater and left it with some person in the theater. After I left the report with this gentleman I left the theater.

At the present time my weight is 250 pounds. At the time I entered the United Artists Theater on South Broadway my weight was 285 pounds. I don't know how you would classify firmness of flesh but I was in good health. My body was firm even though rather obese. It was not the flabby kind of fat that would give away at the poke of a finger. It was good hard flesh. I have lost considerable weight since the time of the accident and have also lost considerable in so far as actual measurements are concerned. My

(Testimony of Jean L. Forsythe.)
hips were bigger at the time I went into the theater than they are now. I have lost quite a bit of growth around the hips and around the abdomen, but I would not [10] not say that in so far as the circumference of my leg is concerned.

When I entered the theater the lights were on.

When I walked down the aisle for the purpose of finding a seat I did not count the rows. I tried to estimate the number of rows in the theater from the front row to the row in which I took my seat. I would not say that I counted them accurately. My statement that I was in the eighteenth row is merely an estimate. As I walked down the aisle and selected the place I wanted to sit I did not find another lady sitting in the seat next to the aisle; there was not anyone there when I walked in. I did not walk by any person in order to get to the seat that I occupied. There was no person occupying seat number one immediately adjacent to the aisle so far as I remember. I think my memory is definite on that.

As I walked down the aisle I had my purse and my coat in my hand. I had no bundles or packages. Maybe I did have a book. I was wearing my coat and I was carrying my purse. I could not say I took my coat off before I sat down. I don't remember whether I did or not. I don't think I did, because I don't remember putting it on to leave, so I probably just kept it on. That was a long dark blue coat of heavy wool.

As I entered the space between the two rows of seats the seat of the chair that I sat in was up. I walked to a place directly in front of the seat. that

(Testimony of Jean L. Forsythe.)

I intended to occupy before I touched any part of the seat. I believe I entered sidewise to lower the seat. There would not be any reason for me entering, facing the front, there was nobody sitting there. I entered walking toward the seat. The seat portion of number one chair immediately adjacent to the aisle, I believe, was up: so that there was no obstacle to my passage in front of seat number one in order to get to seat number two.

In entering the space between the two rows of seats I walked forward in what we will call a normal manner until I got immediately [11] opposite seat number two. The next thing I did was to lower the seat with my hand. I put one of my hands on top of the seat part and lowered it, pushed it down. I pushed all the way down. During that time I was still facing in the same direction in which I faced as I walked in between the two rows of seats. Then I turned around to face the front of the theater and sat down.

This was the first time I had been in that particular theater. That was not the first time I had ever seen seats of the same general type as I observed in that theater. I had, on other occasions, taken ahold of the seat portion of such chairs to lower such portions. When I took hold of this particular seat it did not feel loose to me.

Not having in mind anything like that I would not know whether it felt to me as many others that I had theretofore felt, when I had taken hold of them.

(Testimony of Jean L. Forsythe.)

I didn't notice anything unusual with reference to the seat or with reference to its tightness or looseness at the time I took hold of it and lowered it.

I lowered the seat down as far as it would go before I changed the position of my body. I got it all the way down, still standing sidewise so far as the direction of the row of seats was concerned. If, at the time I was lowering the seat, I had been standing directly in front of the screen, a line extending the line from my right shoulder to my left shoulder would have gone to the screen and reached the screen approximately at a right angle.

If that chair there might be used to illustrate the point I stood approximately as you are standing now, while lowering the seat. In other words, the direction of my body from the right shoulder to the left shoulder might have been turned just a little bit more than your left shoulder, like that, very little more; practically at a right angle was the way I was standing. When I say practically at a right angle I mean practically at right angles [12] to the back of the chair itself and I remained in that position during all of the time that I was lowering the seat of the chair, for about two seconds, or the length of time it takes.

After I got the seat all the way down I then changed my position; I turned around to face the screen to sit down. I partly faced the screen before sitting down.

(Testimony of Jean L. Forsythe.)

In lowering myself into that seat my hips would come in contact with the arms.

I did not examine the chair or any part of it after I fell.

PLAINTIFF'S EXHIBIT No. 5

is a copy of an agreement entered into by and between the defendants Fox West Coast Agency Corporation, a corporation, Fox West Coast Theaters Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, (the contract also involves other entities, none of which is important or material to this case).

Said contract is as follows:

> "This Agreement made and entered into this 20th day of September 1937, by and between Fox West Coast Theatres Corporation, a Delaware corporation (hereinafter referred to as 'West Coast'), Grauman's Greater Hollywood Theater, Inc., a California corporation (hereinafter referred to as 'Grauman's Greater Hollywood'), United West Coast Theatres Corporation, a California corporation (hereinafter referred to as 'United West Coast'), United Artists Theatre Circuit, Inc., a Maryland corporation (hereinafter referred to as 'United Artists Circuit'), United Artists Theatres of California, Ltd., a California corporation (hereinafter referred to as 'United Artists'), Fox West Coast Agency Corporation, a Dela-

ware corporation (hereinafter referred to as 'Agency'), and United Artists Theatre Corporation of Los Angeles, a California corporation (hereinafter referred to as 'Los Angeles United Artists:) [13]

Witnesseth:

Whereas, West Coast is the sublessee of the Loew's State Theatre, Los Angeles, California, for a term ending at the close of business on August 31, 1945; Grauman's Greater Hollywood is the ground lessee of the Grauman's Chinese Theatre in Hollywood, California, for a term ending at the close of business on January 31, 2023; United West Coast is the sublessee of the Four Star Theatre located near the corner of Wilshire Boulevard and Mansfield Avenue, Los Angeles, California, for a term ending at the close of business on December 31, 1938, and which term will be extended so that it will expire on March 31, 1947; Los Angeles United Artists is the lessee of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on December 31, 1957; and United Artists is the sublessee of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on March 31, 1947; and

Whereas, West Coast is the owner of thirty-three and one-third per cent. (33⅓%) of the outstanding capital stock of Grauman's Greater Hollywood and is also the owner of all the outstanding Class 'A' stock of United West Coast; and

Whereas, United Artists Circuit is the owner, directly or indirectly, of sixty-six and two-thirds per cent. (66⅔%) of the outstanding capital stock of Grauman's Greater Hollywood, is the owner of all of the outstanding capital stock of Los Angeles United Artists and is the owner of all of the outstanding stock of United Artists which owns all of the outstanding Class 'B' stock of United West Coast; and

Whereas, the parties hereto desire to consolidate the operation of the theatres above referred to under the sole management and direction of Agency: [14]

Now, Therefore, This Agreement Witnesseth:

That in consideration of the premises and of the sum of One Dollar ($1.00) lawful money of the United States of America by each party to the other in hand paid, receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is hereby covenanted and agreed by and between the parties hereto, each in respect of its own covenants and agreements, and not in respect of the covenants and agreements of any of the others, as follows:

1. Grauman's Greater Hollywood, United West Coast, Los Angeles United Artists and United Artists, and West Coast, respectively, hereby surrender to and vest in Agency the management of the Chinese, Four Star, United Artists Downtown and Loew's State theatres (said four theatres being hereinafter sometimes collectively referred to as 'the theatres'), but excluding any so-called commercial or non-theatre portion, if any, of the theatres or of the buildings in which they are located. All furniture, fixtures, equipment and personal property located in the theatres and used or useful in the operation thereof, shall remain in the theatres subject to the control of Agency. Agency shall manage and operate the theatres for the joint benefit of the parties hereto, and as such manager or operator shall have, among other things, the sole right and authority, and obligation as agent for the other parties hereto, (a) to select, purchase, license, lease and/or book motion pictures to be exhibited in the theatres; (b) to employ the personnel which in the opinion of Agency may be necessary for the successful operation of the theatres, including a local manager for each of the theatres and one 'district manager' for all of the theatres; and (c) to keep all books of accounts and records pertaining to the operation of the theatres. Agency from time to time may change

the respective operating policies of the theatres or of any one or more of them to include or exclude stage shows or other similar attractions, provided the written [15] consents of West Coast and United Artists Circuit shall have first been obtained, and in the event that the operating policy of any theatre is so changed, Agency shall have the sole right and authority and obligation as agent for the other parties hereto, to select, procure, purchase, license, lease and/or book such stage shows or other attractions for exhibition in such theatre. Agency may also from time to time close and thereafter re-open any of the theatres provided the written consents of West Coast and United Artists Circuit shall have first been obtained and in such event the parties hereto shall use their best efforts to dispose of any motion pictures purchased, licensed and/or leased for exhibition in such theatre or theatres during the period that the same may be closed, if such motion pictures are not needed in connection with the operation of any of the other theatres, and the gain or loss resulting from such disposition of motion pictures shall be credited or charged, as the case may be, as operating income or expense.

2. For its services hereunder, Agency shall receive an amount equal to five and one-quarter per cent. (5¼%) of the gross income of the

theatres, which amount shall be paid to it as hereinafter in subdivision (a) of Section 3 provided. For the purposes of this agreement the term 'gross income' shall mean the sum of the gross theatre box office receipts, and all other receipts of whatsoever nature derived from the operation of the theatres, less the amount of theatre admission taxes imposed by any governmental authority having jurisdiction. The term 'gross income' shall not include any booking fees or agency charges based on and deducted from the salary of any performers in the theatres, or any of them, and it is understood and agreed that Agency, or any corporation subsidiary to or affiliated with it, may charge and retain such amounts from performers' salaries without accounting therefor to any of the parties hereto.

3. During the term of this agreement, Agency shall collect the [16] gross income of the theatres, and shall deposit the same in a separate bank account (hereinafter referred to as the 'Operating Account'), it being expressly understood and agreed that all funds in the Operating Account shall be held in trust for the joint benefit of West Coast and United Artists Circuit. From the funds so deposited, but only from such funds and not otherwise, Agency shall be obligated to pay the following:

(a) First, to Agency on Monday of each

week an amount equal to five and one-quarter per cent. (5¼%) of the gross income of the theatres (hereinabove in Paragraph 2 defined) during the preceding week, commencing July 1, 1937; it being understood and agreed that the payments to Agency shall be an amount equal to three per cent. (3%) of such gross income for all periods prior to July 1, 1937.

(b) Second, on the first day of each month, commencing April 1, 1937:

To United West Coast Nine Hundred Twenty-three Dollars and Twenty-five Cents ($923.25) as rental for the Four Star Theatre;

To Grauman's Greater Hollywood Seven Thousand Two Hundred Ninety-one Dollars and Sixty-seven Cents ($7,291.67) as rental for the Chinese Theatre;

To West Coast Thirteen Thousand Four Hundred Eighty-six Dollars and Eleven Cents ($13,486.11) as rental for the Loew's State Theatre;

To United Artists Six Thousand Five Hundred Dollars ($6,500.00) as rental for the United Artists Downtown Theatre.

(c) Third, all other operating expenses of the theatres, as and when the same shall be due. The term 'operating expenses' shall have the meaning ordinarily attributed to it in proper accounting practice applicable to the motion

picture theatre business, and shall include, without limiting the generality of the foregoing (and in addition to [17] the expenses referred to above in subdivisions (a) and (b) of this Section 3), film rentals, cost of stage shows and other attractions, if any, service charges and rent on sound equipment, charges for heat, water, gas, light and power, salaries and wages of persons employed in the operation of the theatres, including, without limitation, a local manager for each of the theatres and one district manager for all of the theatres (provided that the duties of said district manager shall be limited to the supervision, under the direction of Agency, of the management and operation of the theatres), social security taxes paid by the employer, cost of advertising, minor repairs, audits by independent certified public accountants, and premiums on public liability insurance, but shall specifically exclude allowances for depreciation and obsolescence and (except in the case of the Four Star Theatre) taxes and assessments and premiums on fire insurance. With respect to the Four Star Theatre there shall be included in the 'operating expenses' and paid to United West Coast from the operating account, such taxes and assessments and such premiums on fire insurance covering the building and equipment as the sublessee is required to pay with respect to

such theatre under the present sublease (and under any renewals or extensions thereof) between United Artists, as sublessor, and United West Coast, as sublessee, as and when such taxes and assessments and insurance premiums shall be due and payable by United West Coast. Taxes and assessments upon, and premiums on fire and earthquake insurance, if any, covering each of the theatres (except the Four Star Theatre) shall be paid by the party holding said theatre under lease or sublease as in the first preamble of these presents set forth.

(d) Fourth, expenditures deemed by Agency in its sole discretion necessary in the operation of the theatres, or any one or more of them, other than 'operating expenses', as such term is herein defined and other than services specifically excluded from the definition of 'operating expenses', hereinabove set forth, provided, [18] however, that the aggregate amount of such expenditures shall not exceed One Thousand Dollars ($1,000.00) for any one theatre during any period of six (6) consecutive months without the written consent of West Coast and United Artists Circuit having first been obtained.

Except as provided in this subdivision (d) of this section no expense can be charged against any party without its consent for repairs, re-

newals or equipment to a theatre or theatres held by such party, and except as provided in this subdivision (d), no expenditures from the Operating Account for purposes other than those included in subdivisions (a), (b) and (c) of this section may be made without the written consent of West Coast and United Artists Circuit.

(e) The balance of gross income, if any, remaining after the payment, or provision for payment, all in accordance with proper accounting practice applicable to the motion picture theatre business, of the items listed in subdivisions (a), (b), (c) and (d) of this Section 3, shall be termed 'net profits', and such net profits shall be distributed by Agency within twenty (20) days after the close of the next current fiscal accounting quarter, and quarter-annually thereafter (or on such other dates and for such other periods as may be mutually agreed upon in writing by West Coast and United Artists Circuit) one-half thereof to West Coast and one-half thereof to United Artists Circuit.

4. In the event that during the period of this agreement United West Coast, as the sublessee of the Four Star Theatre, or Grauman's Greater Hollywood, as the ground lessee of the Chinese Theatre, or West Coast, as the sublessee of Loew's State Theatre, shall obtain a

reduction in the rental payable by it under the terms of its lease or sublease, the amount payable hereunder as rental for any such theatre shall be reduced for the period and in the amount of such rent reduction.

In the event that during the period of this agreement the total rent paid for the United Artists Downtown Theatre by Los Angeles [19] United Artists to Ninth and Broadway Building Co., or to its successors or assigns as lessor, shall be diminished or reduced to an amount less than Six Thousand Five Hundred Dollars ($6.500.00) per month, whether by agreement or otherwise, the amount payable hereunder to United Artists as rental for said theatre, shall be reduced for the period and in the amount of such rent reduction.

5. Prior to the execution of this agreement, West Coast and United Artists Circuit have each deposited in the Operating Account hereinabove referred to, the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) to be employed in the operation of the theatres. The funds so deposited in the Operating Account may be used in the making of any of the payments referred to in subdivisions (a), (b) and (c) of Section 3 and, to the extent herein provided, in the making of any of the payments referred to in subdivision (d) of Section 3. If at any time during the term of this agreement,

the Operating Account shall be depleted below the sum of Twenty-five Thousand Dollars ($25,000.00) Agency shall forthwith notify West Coast and United Artists Circuit of such fact and of the amount of such depletion, and within twenty (20) days after the giving of such notice, West Coast and United Artists Circuit shall each pay to Agency for deposit in the Operating Account fifty per cent. (50%) of the amount required to restore the amount on deposit in the Operating Account to the sum of Twenty-five Thousand Dollars ($25,000.00), it being the intention that fifty per cent. (50%) of the losses, if any, incurred in the operation of the theatres, shall be borne by United Artists Circuit and fifty per cent. (50%) by West Coast.

6. During the term of this agreement, Agency as agent for the parties hereto, shall effect and maintain in full force and effect public liability insurance covering each of the theatres and the appurtenances thereto in the amount of Fifty Thousand Dollars ($50,000.00) covering injuries to one person in any one accident and in the amount of Five Hundred Thousand Dollars ($500,000.0) [20] covering injuries to more than one person in any one accident, such insurance to be for the benefit of Agency and the particular party hereto holding under lease or sublease the theatre covered by

insurance as their interests may appear. Agency shall be obligated to pay from the Operating Account, but not otherwise, the premiums payable upon such public liability insurance as and when such premiums shall be payable under the terms of said contracts of insurance. Anything hereinabove to the contrary notwithstanding, it is expressly understood and agreed (and the mutual obligation of West Coast and United Artists Circuit to bear fifty per cent. (50%) of the losses as above provided is expressly limited hereby) that the amount of any liabilities arising out of any accident or accidents to persons or property in excess of the amount of all public liability insurance available for the satisfaction of such liabilities, shall be borne and discharged solely by the particular party holding, under lease or sublease as in the first preamble of these presents set forth, the particular theatre in which such accident or accidents shall have occurred.

7. Within ten (10) days after the termination of this agreement, the amount, if any, remaining in the Operating Account after payment, or provision for payment, of all payments provided for in subdivisions (a), (b), (c) and (d) of Section 3 hereof shall be distributed to West Coast and United Artists Circuit, fifty per cent. (50%) to each (or as their respective

interests may appear in the event of the failure of either of said parties to make any payment or payments required to be made hereunder.)

8. It is understood and agreed that the provisions of this agreement become effective as of April 1, 1937, unless otherwise provided herein, and that the term of this agreement is from April 1, 1937 to March 31, 1947.

9. It is understood and agreed that this agreement may not be assigned by any of the parties hereto without the written consent [21] of all of the other parties, provided, however, that Agency may assign all of its rights, powers and privileges under this agreement to any corporation subsidiary to West Coast and organized and equipped to perform similar services, upon condition that such assignee shall assume and agree to perform all the obligations of Agency hereunder, and upon such assignment and assumption Agency shall be relieved from any further liability under this contract except, with respect to all the period prior to such assignment, to account for the gross income and the Operating Account. The term 'subsidiary' or 'subsidiary company' whenever used in this section means any corporation fifty per cent. (50%) or more of the outstanding capital stock of which having voting power is at the time owned by West Coast, or any parent company

of West Coast, either directly or through one or more intermediaries.

10. If at any time or times during the term of this agreement one of the theatres shall be destroyed or damaged to an extent rendering it unfit for use as a motion picture theatre, by fire, earthquake or other casualty, the monthly sum required to be paid on account of the rental for such theatre under the provisions of subdivision (b) of Section 3, shall not be required to be paid from and after the date of such destruction or damage; provided, however, that if such theatre shall be restored to its former condition during the term of this agreement, such monthly payments shall re-commence as of the date such restoration is completed. The destruction of or any damage to any of the theatres (if less than all of the theatres) shall not otherwise affect this agreement or the obligations of the parties hereunder.

11. During the term of this agreement Agency shall render to West Coast and United Artists Circuit:

(a) Daily statements of box office receipts of each of the theatres.

(b) Weekly statements showing receipts, disbursements [22] and expenses of and for each of the theatres for the preceding week.

(c) Annual profit and loss statements with respect to the operations of the theatres, duly

certified by a reputable firm of Certified Public Accountants.

(d) Such other information with respect to the operation of the theatres as may reasonably be required by West Coast or United Artists Circuit.

It is understood and agreed that the dates of the rendering of the weekly and annual statements referred to in (b) and (c) above, and the particular weekly or annual periods respectively covered thereby, may correspond with the dates and periods of similar weekly and annual statements prepared by Agency in the usual course of its business for other theatres managed or supervised by it, appropriate adjustments being made to cover any portion of a week or of a year which may be unaccounted for by reason of the relation of such dates and periods to dates of the commencement and termination of this agreement.

12. The parties hereto acknowledge that the theatres referred to in this agreement have, since on or about November 14, 1934, been operated substantially in accordance with the provisions of this agreement except that the rentals paid for the various theatres have not been the rentals provided to be paid under the terms hereof. In this connection all the parties hereto acknowledge and agree:

First: That all rentals to be paid up to and including March 31, 1937 have been paid and that no party is entitled to any rentals on account of any period prior to April 1, 1937.

Second: That after the deduction of the rentals heretofore paid, and charges and expenses computed in accordance with the provisions of this agreement, [23] and particularly Section 3 hereof (except that the deduction representing the charges for the service of Agency as set forth in Section 3 (a) hereof shall be an amount equal to three per cent. (3%) of the gross income of the theatres up to and including June 30, 1937), West Coast and United Artists Circuit are each entitled to one-half of the net profits arising from the operation of such theatres and all of them from November 14, 1934, to April 1, 1937.

Third: In an event any dispute should arise between any of the parties hereto relating to any matter or thing in connection with the operation of the theatres or any of them since November 14, 1934, the provisions of this agreement shall be determinative and shall apply to such matter or thing with the same force and to the same extent as though this agreement had then been in operation.

13. In the event that at any time during the term of this agreement the Four Star Theatre shall not be used for the purpose of exhibiting

first-run motion picture productions, said Four Star Theatre may, at the election of West Coast, and upon ten (10) days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation of this agreement. After the effective date of such notice the operations of said Four Star Theatre shall revert to United West Coast; provided, however, that if thereafter at any time or from time to time said Four Star Theatre shall be used for the exhibition of first-run motion picture productions, the operation of such theatre may, at the election of United Artists Circuit, upon ten (10) days notice in writing to West Coast and United West Coast, be reincluded in this agreement during such period or periods as said theatre shall so be used, and may similarly from [24] time to time at the election of West Coast, upon ten days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation hereof during such period or periods as it shall not be so used.

14. United Artists and United West Coast agree that prior to the expiration of the term of the sublease of the Four Star Theatre from United Artists to United West Coast, said sublease will be extended on the same terms and conditions as are now contained therein (provided, however, that such terms and conditions may be modified or changed in accordance with

any modifications or changes made of or in a certain agreement between West Coast and United Artists, dated September 1, 1933) so that it will expire March 31, 1947.

15. Reference is hereby made to that certain agreement executed in duplicate at Los Angeles, California, the first day of September, 1933, by and between said Fox West Coast Theatres Corporation, therein referred to as 'Fox' and said United Artists Theatres of California, Ltd., therein referred to as 'United' Anything herein to the contrary notwithstanding, this agreement may be terminated and declared to be of no further force or effect whatsoever at the option of either West Coast or United Artists Circuit upon any termination of said agreement dated September 1, 1933, or any extension or renewal thereof. Such option shall be exercised prior to the expiration of thirty (30) days from and after any termination of said agreement dated September 1, 1933, by notice in writing served upon all the other parties hereto. Said written notice shall specify the date upon which this agreement shall terminate, which termination date shall be not more than thirty (30) days from and after the date of such notice.

16. Nothing herein is intended or shall be construed so as to create a partnership between or among the parties hereto, or to make any

of the parties hereto a partner of any other or all of the remaining parties hereto. [25]

17. All notices, orders or demands of any kind which any party hereto may be required or may desire to serve on any other party hereto under the terms of this agreement may be served (as an alternative to personal service or delivery to such party) by mailing the same by registered United States mail, addressed as follows:

To Fox West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To Grauman's Greater Hollywood Theater, Inc., at 1501 Broadway, New York, New York.

To United West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Circuit, Inc., at 1501 Broadway, New York, N. Y.

To United Artists Theatres of California, Ltd., at 1609 West Washington Boulevard, Los Angeles, California.

To Fox West Coast Agency Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Corporation of Los Angeles at 1501 Broadway, New York, New York,

or such other place as the parties hereto may designate from time to time in writing. Service shall be deemed complete within seven (7) days after such mailing.

18. This agreement is made solely for the benefit of the parties hereto and shall not be construed to render Agency liable to any person, firm or corporation other than the parties hereto, nor to render Agency liable for the payments referred to in subdivisions (b) or (c) and (d) of Section 3 hereof, except as in said Section 3 provided, and except for the obligation of Agency to account for the gross income and the Operating Account. [26]

In Witness Whereof, the parties hereto have subscribed their respective corporate names and affixed their respective corporate seals by their officers thereunto duly authorized, all as of the day and year first above named.

(Seal) FOX WEST COAST THEATRES CORPORATION,

By W. C. NICKEL
Vice President

Attest:

JOHN P. EDMUNDSON
Asst. Secretary

GRAUMAN'S GREATER HOLLYWOOD THEATER, INC.,

By JOSEPH M. SCHENCK
President

Attest:
T. J. HEALY
Secretary

UNITED WEST COAST THEATRES CORPORATION,
By CHARLES P. SKOURAS
President

Attest:
ALBERT W. LEEDS
Secretary

UNITED ARTISTS THEATRE CIRCUIT, INC.,
By WM. P. PHILIPS
Vice-President

Attest:
BERTRAM S. NAYFACK
Secretary

(Seal) UNITED ARTISTS THEATRES OF CALIFORNIA, LTD.,
By JOSEPH M. SCHENCK
President

Attest:
LOU ANGER
Secretary

(Seal) FOX WEST COAST AGENCY CORPORATION,
By CHARLES P. SKOURAS
President.

Attest:
ALBERT W. LEEDS
Secretary [27]

(Seal) UNITED ARTISTS THEATRE CORPORATION OF LOS ANGELES,
By JOSEPH M. SCHENCK
President

Attest:
BERTRAM S. NAYFACK
Secretary

State of New York
County of New York—ss.

On this 21 day of Sept., 1937, before me, Anne M. Murphy, a Notary Public in and for said County, personally appeared W. C. Nickel known to me to be the Vice President, and John P. Edmundson known to me to be the Asst. Secretary of Fox West Coast Theatres Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal the day and year in this certificate first above written.

[Seal] ANNE M. MURPHY

Notary Public. New York Co. Clerk's No. 290. New York Register's No. 8-M-403. Term Expires March 30, 1938.

State of California
County of Los Angeles—ss.

On this 21st day of October, 1937, before me, J. B. Codd, a Notary Public in and for said County, personally appeared Joseph M. Schenck, known to me to be the President, and T. J. Healy, known to me to be the Secretary of Grauman's Greater Hollywood Theater, Inc., the corporation that executed the within instrument, known to [28] me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) J. B. CODD

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 26, 1937.

State of California
County of Los Angeles—ss.

On this 27th day of September, 1937, before me, Ann Friedlund, a Notary Public in and

for said County, personally appeared Charles P. Skouras, known to me to be the President, and Albert W. Leeds, known to me to be the Secretary of United West Coast Theatres Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) ANN FRIEDLUND
Notary Public in and for said County
and State.

State of New York
County of New York—ss.

On this 20th day of September, 1937, before me, Schuyler J. Wilson, a Notary Public in and for said County, personally appeared William P. Philips known to me to be the Vice President, and Bertram S. Nayfack, known to me to be the Secretary of [29] United Artists Theatre Circuit, Inc., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) SCHUYLER J. WILSON

Notary Public, New York Co. No. 196. Register's No. 8 W 300.

Commission expires March 30, 1938.

State of California
County of Los Angeles—ss.

On this 21st day of October, 1937, before me, J. B. Codd, a Notary Public in and for said County, personally appeared Joseph M. Schenck known to me to be the President and Lou Anger, known to me to be the Secretary of United Artists Theatres of California, Ltd., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) J. B. CODD

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 26, 1937.

State of California
County of Los Angeles—ss.

On this 27th day of September, 1937, before me, Ann Friedlund, a Notary Public in and for said County, personally appeared Charles P. Skouras, known to me to be the President and Albert W. Leeds, [30] known to me to be the Secretary of Fox West Coast Agency Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

(Seal) ANN FRIEDLUND

My Commission Expires January 15, 1940.

State of New York
County of New York—ss.

On this 20th day of September, 1937, before me, Schuyler J. Wilson, a Notary Public in and for said County, personally appeared Joseph M. Schenck known to me to be the President and Bertram S. Nayfack, known to me to be the Secretary of United Artists Theatre Corporation of Los Angeles, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named

and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) SCHUYLER J. WILSON
Notary Public, New York Co. No. 196
Register's No. 8 W 300.

Commission expires March 30, 1938." [31]

It was stipulated that any duly qualified officer of either of the corporate defendants in this action, if called, would testify that the only agreement which was in existence as between Fox West Coast Theatres Corporation, a corporation, Grauman's Greater Hollywood Theater, Inc., United West Coast Theatres Corporation, United Artists Theatre Circuit, Inc., United Artists Theatres of California, Ltd., Fox West Coast Agency Corporation, and United Artists Theatre Corporation of Los Angeles, is the agreement marked Plaintiff's Exhibit No. 5 and that said agreement was in full force and effect and had not been terminated in March 1940 and that the United Artists Theater, referred to in the agreement is the same theater which has been described in the pleadings and in the evidence in this case.

The econtract was thereupon offered in evidence by the plaintiff.

The defendants and each of them objected to the receipt of the contract in evidence or the introduction of the contract in evidence "upon the ground that the plaintiff is not a party to the contract, and that contractual relationships existing beween other persons do not give any rise to any duty which either of the defendants may, under the law, owe to the plaintiff in this case, that duty only arising in the event that the plaintiff was an invitee of the defendants, or of a particular defendant. The plaintiff cannot predicate her right of action, which is ex delicto, upon the terms or provisions of any contract, and the contract gives the plaintiff no rights whatever as against either of the defendants. I therefore object to the introduction of the contract upon the following several grounds, not jointly:

First: The contract is not competent proof of any fact in this case.

Second: The contract is not material to any issue in this case. [32]

Third: The contract is not relevant to any issue in this case.

Fourth: The contract does not and cannot furnish the slightest solace or benefit to the plaintiff in this case, and does not prove or tend to prove the existence of any duty whatever towards the plaintiff, and does not prove or tend to prove whether the plaintiff was or was not an invitee of the defendants, or either of them."

Subject to the objections heretofore set forth with reference to the reception in evidence of the written contract, Plaintiff's Exhibit 5, together with the further objection that the contract is not proof of the relationship of invitor and invitee as between the Fox West Coast Agency Corporation and the plaintiff, and that the contract does not prove or is not competent for the purpose of proving the existence of any duty owed by the Fox West Coast Agency Corporation to the plaintiff, and that proof of a failure, if any, on the part of the Fox West Coast Agency Corporation to perform any duty or obligation it may have contracted to perform for the actual owners and operators of the United Artists Theatre at 933 South Broadway would not give the plaintiff any right of action for damages because of that breach, the defendants stipulated that the relationship in existence between the Fox West Coast Agency Corporation, a corporation, and the Fox West Coast Theatres Corporation, a corporation, was in accordance with the terms and provisions of the written contract, Plaintiff's Exhibit 5, with the reservation also that if the court overrules the general and specific objections heretofore shown to have been interposed, the evidence in the form of the contract should be restricted with reference to its effectiveness as evidence and received for the sole and exclusive purpose of showing what relationship, if any, was created by and between the Fox West Coast Agency Corporation and the Fox

West Coast Theatres Corporation, pursuant to the terms and provisions of the contract, and that the contract should be excluded in so far as it might be evidence of any duty owing by the defendant Fox West Coast Agency Corporation to the plain-
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tiff, or any of the other matters which were the subject matters of the specific objections.

The trial court overruled the objections to the admission of said contract, Plaintiff's Exhibit 5, and denied the request of the defendants, and each of them, with reference to limiting the effect of the contract as evidence.

> "Mr. Gallagher: May I inquire whether the Court, in overruling the objections to the admission of the contract, would also deny the request of the defendants, and each of them, with refrence to limiting the effect of the contract as evidence? The defendants, your Honor, admit it for certain specific purposes only.
>
> The Court: Well, I think that could only become material if the objections were made before a jury, because the Court will only consider evidence that is material to the issue before it in a trial of this kind and an examination of the law will disclose whether there are limitations which the Court should consider. I think it would be necessary to rule upon the request if we had a jury, but being before the Court I will rule on it as I have.

The Clerk: That will be Plaintiff's Exhibit No. 5.

Mr. Gallagher: May I point out, your Honor, that the defendants, and each of them, maintain that the ruling is just as important in a trial without a jury as in a trial before a jury, because there is no way to show in the record what portions of the contract the trial judge considers material to any particular point, or whether the trial judge took any portion of the contract as the basis of proof of the existence of some duty or obligation the breach of which entails a legal liability on the part of any defendant to the plaintiff, who is not a party to the contract, and that is why I respectfully requested an order limiting the proof so that the record would show what purpose the contract was being received for, and I submit that it is just as important to have that sort of a ruling in a trial before your [34]
Honor, since you now constitute the jury as well as the judge, as it would be if we had a jury.

The Court: I have not read this contract and I don't know what the limitations are. I have just admitted it in evidence. Now counsel is asking me to construe a contract which I have not read.

Mr. Gallagher: Well, I am very sorry if your Honor received that impression from what

I have said. I have asked that the contract be restricted to certain matters of proof, and I have asked the court to limit the contract itself so that no part or portion of the contract can be resorted to for the purpose of determining that there was any duty owing by the Fox West Coast Agency to this plaintiff, or that she was an invitee of the Fox West Coast Agency Corporation, or that any agreement which the Fox West Coast Agency Corporation may have assumed so far as the Fox West Coast Theatres Corporation is concerned, if breached, would permit this plaintiff to prosecute the Fox West Coast Agency Corporation for damages.

The Court: Well, if that is your only point, I thought I made it very clear when I stated that the plaintiff in this action cannot recover against any defendant in the action because of contractual relations that existed between those defendants. In other words, they can neither avoid nor give the plaintiff a cause of action against them if that cause of action did not exist in the absence of the contract. Now, let me make it clear again: I hold that both the principal and the agent who had charge, if it is shown that he had charge of the theatre and managed the theatre for the owner, and did it in a negligent manner—I hold that both the agent and principal can be sued as joint tort feasors. That is where you and I disagree, Mr.

Gallagher. Now, with that in mind, the contract is admitted in evidence. I have no evidence before me as to just what the Fox West Coast Agency was in this picture.

Now, I would like to look at this contract, and you may be able to point out to me, Mr. Rountree, what this Plaintiff's Exhibit No. 5 [35]
shows, or you claim, with reference to this Fox West Coast Agency Corporation.

Mr. Rountree: I claim it shows that the other defendant corporations, together with other interested parties, surrendered to the Fox West Coast Agency Corporation full control and management of the theatre; that by its terms it handled the employees; it was the concern which employed the various members of the staffs of the theatres; that it selected the theatres. In other words, by the terms of this agreement, the Agency Corporation became the operating agency; that it was the organization which actually carried on the operation of the theatre, for which it received a percentage of the gross profits, and it also handled the distribution of income of the theatre. There may be some portions of that underlined in pencil, which was done by myself at another time.

The Court: (After reading the contract) You may proceed, gentlemen."

On June 4th, 1940, the plaintiff commenced a prior action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered amongst the files of said court 452891 and named as defendants the following: "Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe, Ltd., a corporation, John Doe and Jane Doe. Only the defendant Fox West Coast Agency Corporation, a corporation, was served with summons and complaint in said action number 452891. Said defendant Fox West Coast Agency Corporation, a corporation, filed an answer to said complaint in the said Superior Court of the State of California, in and for the County of Los Angeles, on or about June 28th, 1940.

A copy of said complaint in Superior Court action No. 452891 was received by the trial court in the case at bar, in evidence as Plaintiff's Exhibit No. 6 and a copy of the answer of the defendant Fox

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West Coast Agency Corporation, a corporation, in said action bearing Superior Court No. 452891, was received by the trial court in the case at bar in evidence as Plaintiff's Exhibit No. 7.

Each exhibit was received over the objections of the defendant Fox West Coast Agency Corporation, a corporation, and the proceedings showing what occurred at the time the said complaint and answer were offered and received in evidence are as follows:

"Mr. Rountree: At this time, if the Court please, we will offer the complaint and answer which have heretofore been referred to, and portions thereof introduced by the defendants, in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Jean L. Forsythe, plaintiff, vs. Fox West Coast Agency Corporation, et al., and bearing No. 452891.

Mr. Gallagher: To that offer the defendants desire to make general objections and specific objections. The general objections are:

First: That the offered evidence is not competent for proof of any fact or issue raised by the pleadings in the case now being tried.

Second: Said offered evidence is not material for proof of any fact or material to any issue of fact raised by the pleadings in the action now being tried.

Third: Upon the ground that the offered evidence, to wit, the complaint and the answer in the action numbered 452891, are not relevant to any issue made by the pleadings in the case at bar.

Specifically and severally, I object to the offer of the plaintiff's complaint in said action upon the following grounds:

First: The document is a self-serving declaration of the plaintiff and is not competent for proof of any of the issues of fact raised in

the pleadings in the case at bar with reference to any alleged tort liability. In other words, the defendants object to this complaint, in addition to the foregoing grounds, upon the

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ground that the allegations of the complaint are not competent proof of the existence of any relationship whatever as between the plaintiff and either of the defendants, or the existence of any duty between plaintiff and either of the defendants, or the breach of any assumed duty which may have existed on the part of the defendants, or either of them, towards the plaintiff, or with reference to any proximate causal connection between any alleged negligence and any injury sustained by the plaintiff, or with reference to proof of any damage sustained by the plaintiff as a proximate result of any actionable negligence, on the part of the defendants, or either of them.

Now, I desire to make a specific objection to each paragraph of the complaint as offered.

The defendants, and each of them, object to the offer of Paragraph I of the complaint upon each and all of the grounds heretofore specified, and upon the general ground that said paragraph is evidence which is incompetent, and upon the several and distinct grounds not stated in the conjunctive that it is also immaterial and is also irrelevant.

The defendants, and each of them, object to the allegations, and each and every element thereof, contained in the allegations of Paragraph II, upon each and every ground stated hereinbefore, such statement of each ground to be considered as a several and distinct objection made upon each of said grounds.

With reference to the allegations in the third paragraph, the same objections and each thereof are repeated.

With reference to the fourth paragraph, the same objections and each thereof, are repeated, and by repetition I mean to re-urge the same and each thereof to the allegations of both paragraphs III and IV.

With reference to the allegations of Paragraph V, the same objections and each thereof are repeated and re-urged with reference to the allegations and each and every separate or distinct element contained therein. [38]

With reference to the allegations in Paragraph VI, the defendants, and each of them, repeat and re-urge each and every objection heretofore made with reference to this offered evidence.

With reference to Paragraph VII of the complaint, the defendants, and each of them, repeat and re-urge each and every objection heretofore mentioned upon the same grounds severally as have been urged to the foregoing paragraphs.

With reference to the prayer of the complaint, the defendants, and each of them, make the same objections, and each thereof, and re-urge the same, and each thereof.

With reference to the verification to the complaint, the defendants repeat and re-urge each of the objections as hereinbefore specified to the offer of the complaint, or any specific paragraph thereof.

The defendants, and each of them, object to the offer of the answer of Fox West Coast Agency Corporation upon the following grounds:

First: The answer is not substantive proof of any fact or circumstance in issue in the case now being tried before this honorable court.

Second: The answer is not competent evidence of any fact.

Third: The answer is not material.

Fourth: The answer is not relevant.

I also specifically urge, as additional grounds of objection to the introduction of these pleadings, the proposition that pleadings in a prior action, or in the action now being tried by your Honor, are not to be received as evidence of any of the matters therein contained. By that I mean as substantive evidence of any such matters.

Now, so far as the defendant Fox West Coast Theatres Corporation is concerned, it

makes and reserves a separate and distinct ob-
[39]
jection from those in which it has joined with its co-defendant, Fox West Coast Agency Corporation, for the reason that these pleadings were not, and none of them was ever at any time served upon the Fox West Coast Theatres Corporation, and the Fox West Coast Theatres Corporation filed no pleading whatever in said action, and no matter stated in the answer of Fox West Coast Agency Corporation and no matter omitted from the answer of the Fox West Coast Agency Corporation in that action, is, in the slightest degree, binding upon the Fox West Coast Theatres Corporation.

Now, with specific reference to the allegations in the answer, the defendants, and each of them, object to the introduction of the allegations contained in Paragraph I upon each and every ground which has been specified hereinabove in the objections to the offer of the complaint, and the same objections are made, and each thereof is made, to the offer of the allegations of Paragraph II of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations of Paragraph III of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations contained under the heading of "As and for a first separate and special defense."

The same objections, and each thereof, are made to the offer of the allegations, contained in the paragraph headed "As and for a second separate and special defense", set forth in said answer.

The same objections, and each thereof, are re-urged to the prayer of said answer, and the same objections, and each thereof, are repeated and re-urged to the verification of said answer.

The Court: I will hear you.

(Argument of counsel.)

The Court: Objections overruled.

Mr. Gallagher: Might I ask, your Honor, for the record, whether the Court is admitting the complaint and the answer as substantive

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evidence for all purposes with reference to each and every issue of fact raised by the pleadings, or whether the Court is admitting this complaint and answer for some specific purpose?

The Court: I am admitting them, as I will state again, so that the record will be clear, and so that counsel will be protected if there is any error in the ruling—I am admitting them the same as if the plaintiff in this action had written a letter containing these statements to the defendants, or the same parties, or the defendant represented by Mr. Bertero in the present action, and if that defendant had written a letter to the plaintiff making the denials and admissions; the same as if it were in the form of

correspondence. I don't know that I can make it any clearer.

Mr. Gallagher: Well, then, I assume, from what your Honor has said, that the Court is admitting this evidence for the sole and exclusive purpose of a declaration against interest, or an admission on the part of the Fox West Coast Theatres Corporation, and not for any purpose other than that, and I ask the Court to so limit the effect of the evidence without waiving the objections, or any of them, that have been made.

The Court: That is correct. Proceed."

BAYARD R. ROUNTREE,

produced as a witness on behalf of plaintiff, testified as follows:

"Direct Examination

Q. By Mr. Emme: What is your profession or occupation?

A. Attorney at law.

Q. Are you associated with any law firm at this time?

A. The firm of Rosecrans and Emme.

Q. And you were associated during all of the year 1940 and up to the present time?

A. That is right.

Q. Do you know Mr. Bertero, the secretary of the Fox West Coast Agency Corporation?

[41]

(Testimony of Bayard R. Rountree.)

A. I think he is assistant secretary. Yes; I met him about the 11th or 12th of June, 1941.

Q. Where did you meet him?

A. In the office of that concern at the corner of Vermont and Washington, as I recall the address.

Q. Did you have a conversation with Mr. Bertero in refrence to the operation of the United Artists Theatre on South Broadway in the City of Los Angeles?

Mr. Gallagher: That is objected to on two grounds. First, it calls for hearsay, and second, it calls for a conclusion of the witness based on hearsay, and it would not be competent for any fact in this case. The mere fact that a man is secretary of a corporatioin does not clothe him with the right to make declarations with reference to past events, or have any conversation which would have the effect of establishing substantive proof of the existence of past events or past conditions.

The Court: The objection is premature, because the only question was: 'Did you have a conversation?'

Mr. Gallagher: With reference to certain things.

The Court: Yes; he can say yes or no to that. Is not that the answer to it? He has not asked him more than that. Read him the question.

(Question read by the reporter.)

(Testimony of Bayard R. Rountree.)

The Court: 'Yes' or 'No.'

A. Yes.

Q. By Mr. Emme: Where did this conversation take place?

A. In the office of the Fox West Coast Agency Corporation. I believe there are several names on the door, but I know that is one of them. That is the corporate name that is on the door.

Q. Did you discuss his answer in the case on file, No. 452891, and also the case on trial in this department?

The Court: 'Yes' or 'No'. [42]

A. Yes; I did. That is, at that time I discussed the answer in the first case and the answer in the Superior Court. Not the answer that is filed to the amended complaint in this court.

Mr. Gallagher: I move to strike out the answer of the witness on the ground, that in effect, it is stating hearsay, and there is no evidence proving or tending to prove that Mr. Bertero had any authority whatever to speak for or on behalf of either defendant in this case with reference to any fact in issue in the case now being tried. The evidence must prove that whatever statement was made was made in the course and scope of some actual authority. The mere fact that a man is secretary of a corporation does not give him the right to go out, or

(Testimony of Bayard R. Rountree.)

even in his office, and have conversations with somebody with reference to some past event.

Q. By the Court: As I understand it, this is the same individual who signed and verified the answers to the complaints in this action?

A. That is right.

The Court: Do I understand that counsel repudiates his authority to verify those answers, and that the verifications are false oaths of the secretary? Is that my understanding?

Mr. Gallagher: No, no, your Honor.

The Court: I understood you to say he could not speak for the corporation. If he could not speak for the corporation, then he has made false oaths in verifying these answers.

Mr. Gallagher: Not at all.

The Court: Or he can only speak when it is in the interest of the corporation but he must be silent when anything comes out of his mouth that is unfavorable to the corporation; is that correct?

Mr. Gallagher: No; that is not what I contend at all.

The Court: All right. Let us have it.

Mr. Gallagher: What I contend is there is no evidence proving or tending to prove that Mr. Bertero was authorized to speak to Mr.

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Rountree with reference to any answer which may have been filed or which was going to be

(Testimony of Bayard R. Rountree.)

filed in any lawsuit. Furthermore, there is no evidence proving or tending to prove that Mr. Bertero was authorized by either corporation to have any conversation with Mr. Rountree about what had happened at the theatre on March 24, 1940, or at any other time, or at all, and I submit that that has nothing to do with his verification of their answer.

The Court: In other words, your position is that an officer of the corporation can verify an answer, but he cannot be inquired of with reference to his verification of the particular answer in that particular action. Now, he was either authorized to verify the answer or he was not.

Mr. Gallagher: Certainly, he was authorized to verify the answer.

The Court: But you cannot inquire of that man who verified the facts in that answer as to anything about the facts in the answer or connected with that transaction?

Mr. Gallagher: Yes. He is not here as a witness, you understand."

"Direct Examination (Resumed)

Mr. Emme: Will you read the last question and answer, please.

(Last question and answer read by the reporter, together with motion to strike.)

The Court: The motion is overruled.

(Testimony of Bayard R. Rountree.)

Q. By Mr. Emme: By referring to the case in the Superior Court, you were referring to the case pending in the Superior Court, No. 459395, and case No. 452891, in the Superior Court of Los Angeles County?

A. That is correct.

Mr. Gallagher: If your Honor please, for the purpose of avoiding the renewal of objections which were made with reference to the

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testimony of this witness in regard to conversations with Mr. Bertero, I wonder if counsel is willing to sitpulate, if it is satisfactory to your Honor, that all of this line of testimony having to do with conversations with Mr. Bertero shall be deemed to have been objected to upon each and every ground stated during the testimony of Mr. Rountree with the same force and effect as though restated verbatim?

Mr. Emme: Yes.

The Court: It will be so understood.

Q. By Mr. Emme: And the Mr. Bertero that you had this conversation with is the same Mr. Bertero who verified the answers as assistant secretary of the Fox West Coast Agency?

A. Yes.

Q. What was the conversation?

A. I told Mr. Bertero the occasion for coming out was the fact that in the first answer

(Testimony of Bayard R. Rountree.)

they had filed they had admitted the allegations of the operation of the theatre, and in the second answer they had denied it. He said, 'Yes; in the first case, as I recall, we simply did not deny the allegation.' He said, 'I am a lawyer, so I know that in effect we admitted it.' I asked him how it happened that there was a denial in the second answer. He said, 'Well, I objected strenuously to verifying the answer with the denial, but it was a matter of interpretation of the term 'operation' and upon the insistence of Mr. Gallagher that he was entitled to verify it with the denial in there, he had verified it. I said, 'Well, what is the situation with reference to the operation of the theatre?' He said, 'Well, the theatre—' that is, the downtown theatre, we had identified the particular theatre—the United Artists downtown theatre—'is operated under the terms of a contract,' and he either had the contract on his desk or sent for it and at that time showed me the contract and particularly turned to the first numbered paragraph of the contract starting on page 2 of the contract. [45]

Q. I notice you are now looking at a document. Is that Plaintiff's Exhibit No. 5 in this proceeding?

A. Plaintiff's Exhibit No. 5, yes.

Q. Is that the document he showed you at that time?

(Testimony of Bayard R. Rountree.)

A. Well, this is a photostat of the document. I believe it was the original contract that he showed me at that time. As I recall it, it was a bound volume, but it was the same document. We had some conversation about the terms as set out there in that first paragraph.

Q. By the Court: On page 2?

A. On pages 2 and 3. The paragraph starts at the bottom of page 2. It covers all of page 3 and part at the top of page 4. We also discussed Paragraph 2, which provides that the agency should receive 5.25 per cent of the gross income of the theatres. I said, 'Well, you are operating under that contract? That is, you are conducting the theatres?' He said, 'Yes, in accordance with the terms of the contract there set out. That is the thing that is being carried out, and was at the time the accident happened.' I think he called my attention to the fact that the contract was executed in 1937. I asked him if the Agency Corporation paid the employees. He said, 'The funds are put in what they call an operation or account—' that is, the income of the theatre— 'and the funds are distributed from that by the Agency Corporation'; the employees were paid from that fund and the agency itself got a percentage from that fund and the other two or three corporations—he designated them; there are

(Testimony of Bayard R. Rountree.)

several corporations named here; I always have difficulty in remembering which is which.

Mr. Gallagher: May I have the last part of the answer read?

(Last part of the answer read by the reporter, beginning 'he designated them.')

Q. By Mr. Gallagher: That is, you or Mr. Bertero? [46]

A. No. I was merely trying to identify the corporations' names with accuracy. I will say that I recall specifically the two corporations other than the West Coast Agency Corporation which are the other parties named in this case. I think I asked him if they selected the pictures, if the Fox West Coast Agency Corporation selected the pictures, and he said, 'Yes; they are on a booking arrangement of some kind,' and we did go into detailed discussion as to how the pictures were booked.

Q. By Mr. Emme: Did you have any further conversation with him?

A. You mean on that day?

Q. Yes.

A. Yes; there was some other conversation. I don't know as I can recall it all. I know he told me that he was busy, very busy, and did not like to have to take time out to have his deposition taken, and was very glad to give me any information we could get by taking his deposition. I think we had some conversation

(Testimony of Bayard R. Rountree.)

about obtaining a copy of the contract at that time, Mr. Bertero was supplying us with a copy of the contract. I am not quite sure whether that was that day or in a telephone conversation a day or two later.

Q. Did you have a telephone conversation with him a day or two later?

A. Yes.

Q. Did you recognize his voice on the phone?

A. Yes.

Q. What was the conversation?

A. I told Mr. Bertero that Mr. Gallagher and myself had been unable to reach a stipulation as to certain facts, and we would like to get a copy of the contract. If I recall correctly, at the time—I think that was the next day after the conversation at the office.

Q. Well, these conversations all took place in the early part of June, 1941? [47]

A. If you will let me have the file to refresh my memory I think I can answer. I am quite sure the first conversation took place on either the afternoon of the 11th of June or the morning of the 12th of June, because I prepared a stipulation after the conversation with Mr. Bertero, and that was done on the 12th of June.

Q. Of what year?

A. Of 1941. The 12th of June, 1941. I am quite sure that I talked to Mr. Bertero on the

(Testimony of Bayard R. Rountree.)

morning of June 13th, because I recall going to Mr. Gallagher's office late in the afteroon on the 12th and not leaving there until after five o'clock, so it was the next morning that I called Mr. Bertero on the phone.

Q. What conversation did you have with him on the telephone?

A. At that time, on the phone, I recall that he said that he would be glad to let us have the copy, but I think he told me at that time that their photostat equipment had not arrived from the East, and I asked him if I could bring a stenographer out to make a copy and he told me that I could. That was the extent of that telephone conversation.

Mr. Emme: You may cross-examine.

Mr. Gallagher: In view of the fact that the defendants made the objection to this testimony which were made, and solely for that reason, I will not cross-examine."

(Rep. Tr. pg. 94, line 24 to pg. 100, line 11).

JOHN B. BERTERO,

called by the plaintiff for the purpose of cross examination, testified as follows:

I am and in March 1940 was an attorney at law and also a director and officer of the Fox West Coast Agency Corporation, a corporation, and of Fox West Coast Theatres Corporation. Plaintiff's

(Testimony of John B. Bertero.)

Exhibit No. 5 is a photostatic copy of a contract in force on March 24th, 1940. The method set out therein was carried out at that time by the corporations enumerated therein, to the best of my knowledge. [48]

"Q. By Mr. Emme: Will you state the conversation you had with Mr. Rountree in the early part of June, 1941?

Mr. Gallagher: Objected to on the ground it is immaterial and not competent as proof in this case, no foundation laid, no showing of the authority of the witness at that time to have any conversation with Mr. Rountree with reference to any past event or with reference to any condition which may have existed in the past.

The Court: I think you better lay the foundation in the face of an objection of that kind. The witness has testified as to his authority and position at this time, but there is no evidence as to his authority or position in 1941.

Mr. Gallagher: I will stipulate that he was assistant secretary of the corporation at the time the conversation occurred. The objection is based on this proposition: That there is no proof that Mr. Rountree and Mr. Bertero were discussing any business transaction in which the Fox West Coast Agency was interested, or that they were discussing any matter within the scope of Mr. Bertero's authority as assistant secretary of the corporation.

(Testimony of John B. Bertero.)

The Court: Of course, I cannot pass on that until I know what he is going to say.

Mr. Gallagher: And it is an attempt to vary the terms and provisions of a written instrument, to wit, Plaintiff's Exhibit No. 5, which is plaintiff's evidence produced here.

The Court: That is not the subject of the litigation here. That is merely an exhibit, so that the rule of evidence with reference to varying a written instrument would not apply.

Q. By the Court: On March 24, 1940, just what were your official connections with the various corporations?

A. I was assistant secretary of Fox West Coast Agency Corporation and a director of that corporation.

Q. By Mr. Gallagher: Will you please talk a little louder? [49]

A. I was assistant secretary of Fox West Coast Agency Corporation and a director of that corporation, and also of Fox West Coast Theatres Corporation and I was a director of both corporations.

Q. By the Court: What office did you hold with the Fox West Coast Theatres Corporation?

A. Assistant secretary and also a director.

Q. Of both?

A. Of both.

(Testimony of John B. Bertero.)

Q. Of both the Fox West Coast Agency and the Fox West Coast Theatres Corporation?

A. Yes.

Q. Was there anyone else present at the time of this conversation in June, 1941?

A. No one, with the possible exception of a file clerk or my secretary may have entered my office while Mr. Rountree was there.

Mr. Gallagher: It is very difficult to hear you?

The Court: Will you read that answer, Mr. Reporter?

(Answer read by the reporter.)

The Court: Objection overruled. Proceed.

A. By Mr. Emme: What was the conversation had with Mr. Rountree?

A. I had been served with a subpoena to take my deposition as an officer of Fox West Coast Agency Corporation, I believe, in the middle of June, and it is my personal recollection that I phoned Mr. Emme and asked him to spare me the time and anoyance attending a formal deposition; that our company was quite willing to give whatever information they desired at an informal conference between myself and Mr. Emme. Subsequently I wrote a letter expressing the same thought, and Mr. Rountree, upon appointment, came to my office to make such inquiries as he might deem proper, and Mr. Rountree asked concerning who op-

(Testimony of John B. Bertero.)

erated the United Artists Theatre in Los Angeles, and I told him it was operated subject to an agreement between certain parties, and [50]

I showed him the original agreement and permitted him to inspect it.

Q. Did you enumerate those parties at that time?

A. I showed him the original contract, of which Exhibit No. 5 is a photostatic copy. We had some conversation about just what capacity or services Fox West Coast Agency Corporation was performing, and we did discuss the question whether it was operating the theatre. I told him that Mr. Gallagher had expressed to me the legal theory that Fox West Coast Agency Corporation was not the operator of the theatre, and we talked about that point, about lawyers differing on the interpretation of words. Then, as I recall, I offered to supply Mr. Rountree with a copy, and subsequently he called me on the telephone and, as he narrated —I have no independent recollection of the conversation, but all in all—well, pardon me. I have no further recollection of the conference.

Q. Did you definitely discuss the answers that had been filed in the first case and the second case?

A. I am quite sure we did.

Q. Didn't you tell him that you did object

(Testimony of John B. Bertero.)

to verifying the second answer in the form it was in?

A. I don't know that I used the word 'object.' I did tell him I had had a conversation with Mr. Gallagher about the propriety of verifying the answer concerning the word 'operating' or 'operator,' or some such use of that term.

Q. Did you discuss what percentage of the proceeds from the theatre went into the Fox West Coast Agency Corporation?

A. Well, we had the contract before us, and undoubtedly we had reference to the contract to show the provisions of the contract.

Q. Did you inform him that that was being carried out?

A. Yes; I did.

Q. And it was being carried out, was it?

A. Yes; to the best of my knowledge. [51]

Q. At that time, in 1940?

A. Yes. Well, no; the conversation took place in 1941.

Q. I beg your pardon. That is right. The terms of the contract were being carried out on March 24, 1940?

A. To the best of my knowledge.

Mr. Gallagher: Just a minute. I thought there was more to the question. I object to the question on the ground it calls for a conclusion and opinion of the witness and that no

(Testimony of John B. Bertero.)

proper foundation is laid to show that he was down there at the theatre.

The Court: That is right. I will sustain the objection. The question will have to be put in another form. That calls for a conclusion of the witness.

Q. By Mr. Emme: What was being done at that time?

Mr. Gallagher: We object to that on the ground it is ambiguous.

The Court: What was the question?

(Last question read by the reporter.)

Mr. Gallagher: If counsel wants to know the fact as to who paid the money, whose employees they were, who employed the manager and the janitors, paid them off, I have no objection; as a matter of fact, I have the documentary evidence here to show those facts, who paid the social security tax and who paid the unemployment benefit taxes, and where the money came from that paid these men, and where they were paid. I have no objection to the fact, but I object to these conclusions that are called for.

The Court: Yes; that calls for a conclusion.

Q. By the Court: Just what did you have to do with the United Artists Theatre? Did you have any connection with it? Did you go down there at all?

A. I never visited the theatres, your Honor, but I signed the checks. I know they had a

(Testimony of John B. Bertero.)

separate established bank account for the four theatres and I know, as a director of Fox West Coast Theatres Corporation, the amount of income that they derived from each picture, and

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I kept acquainted from time to time with what pictures were being shown at the theatre and had discussions as to whether the pictures were paying well or poorly.

Q. Well, Mr. Bertero, do you stay there in person? You have that information, but you don't say what official connection you have. Do you give any directions in your capacity as secretary? Do you have anything to do at all with the theatre?

A. Well, your Honor, I sign the checks on the funds. Does that answer part of your Honor's question?

Q. Is that all you do?

A. I sign checks; I consult with the theatre managers; they bring problems to me, and I would give them advice on their problems, and other than keeping acquainted with the problems connected with the theatres, I issued no orders, had no authority to direct the management of the theatres.

Q. Who had that authority?

A. That rested in Mr. Charles Skouras.

Q. By Mr. Emme: What connection has he with the Fox West Coast Agency Corporation?

(Testimony of John B. Bertero.)

A. He is the president of that corporation.

Q. And that corporation hired the manager down there at the United Artists Theatre on Broadway?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion and opinion of the witness and is ambiguous. Does counsel mean a manager who was the servant of Fox West Coast Agency Corporation and paid by it, or a servant of the Fox West Coast Theatres Corporation?

The Court: If he can, he may answer the question.

The Witness: May I have the question?

Q. By the Court: Well, to simplify it, somebody had to run that United Artists Theatre; some individual had to run it?

A. Yes. [53]

Q. Who was that?

A. The managers and their appointments were made by Mr. Skouras.

Q. By Mr. Emme: And he was president of the Fox West Coast Agency Corporation?

A. That is right. He is also president of the Fox West Coast Theatres Corporation."

(Rep. Tr. pg. 102, line 12 to pg. 108, line 16).

In my capacity as assistant secretary of Fox West Coast Theatres Corporation I have knowledge of a certain entity referred to as the Fox U. A.

(Testimony of John B. Bertero.)

Venture. In reference to United Artists Theater on South Broadway, I knew, at the time I verified the answer in the federal court case to the amended complaint filed in the federal court, that all of the money taken in from the sale of tickets, in other words, the income from the conduct of the business of United Artists Theater at 933 South Broadway, went into a bank account kept separate and apart from any bank account of Fox West Coast Agency Corporation.

I knew that the payroll records of all of the persons from the manager of the theater on down to, we will say, the lowest employee in scale in that theater during the month of March, 1940, were kept in the name of Fox U. A. Venture.

"Fox U. A. Venture" was a bookkeeping title set up to economically describe the arrangement so far as accounting and other methods were concerned under Plaintiff's Exhibit No. 5. The name "Fox U. A. Venture" refers only to United Artists Theatre Circuit, Inc. and Fox West Coast Theatres Corporation.

After the 5.25 percent of the gross income of the United Artists Theater at 933 South Broadway was deducted, and the payment of salaries of employees in that theater, including the manager of that theater, were deducted, the balance of that money went into a separate bank account, and ultimately what

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we call distributions of the Venture were distrib-

(Testimony of John B. Bertero.)

uted to the two parties to the Venture; that is, the Fox West Coast Theatres Corporation and the United Artists Theatre Circuit, Inc.

I was never present at any time when Mr. Skouras employed or made arrangements to have any person work at the United Artists Theater in Los Angeles; by that I mean any janitor or any usher or any manager or assistant manager of that Fox U. A. Venture.

I obtained from the original records kept by the Fox U. A. Venture payrolls or duplicate originals of payrolls showing employees at the United Artists Theater at 933 South Broadway for the entire month of March, 1940. I think these documents are the originals; yes, they are the originals.

With reference to these documents just referred to the following proceedings occurred at the trial:

> "Mr. Gallagher: Now, if your Honor please, we would like to offer these in evidence with the request that either typewritten copies or photostatic copies may be substituted for the originals, if counsel have no objection, because the accounting office wants these records returned.
>
> Mr. Rountree: We have no objection to the substitution of copies, but we object to the offer on the ground it is incompetent, irrelevant and immaterial.
>
> The Court: What is the purpose of the offer, Mr. Gallagher?

(Testimony of John B. Bertero.)

Mr. Gallagher: The purpose of the offer, if your Honor please, is this: The evidence will show that there were a number of persons employed in that theatre who were not in the employ of the Fox West Coast Agency Corporation. In other words, it is a link in proof showing that the manager of the theatre and an assistant manager, if there was one, and all of the ushers and janitors and porters and cashiers were employees of the Fox U. A. Venture, consisting of Fox West Coast Theatres Corporation and United Artists Theatre Cir-

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cuit, Inc., a corporation. It is also material for the purpose of showing that there were many persons in and about the theatre who were employees of Fox West Coast Theatres Corporation and United Artists Theatre Circuit, Inc., a corporation. It will show that those persons who were in the theatre, and who had actual physical contact with the equipment, were not employees and servants, or employees or servants, of Fox West Coast Agency Corporation, a corporation. The evidence is also material for the purpose of establishing, as a matter of law, that the doctrine of res ipsa loquitur, which the plaintiff states in her memorandum she relies upon, is not applicable and could not be applicable because of divided control and divided responsibility. By referring to the foregoing

(Testimony of John B. Bertero.)

specific matters, I don't mean to preclude the claim that the documents are admissible in evidence and are material and relevant and competent for proof of any fact or issue in the case to which they may be directed as probative evidence, and I offer them for any and all proper purposes, to be considered as evidence for any and all proper purposes under the law as the case and issues are made by the pleadings.

Mr. Rountree: I will add to my objection, if the Court please, the further ground that it is a self-serving declaration and hearsay, and does not prove the matters counsel says he seeks to prove thereby.

Mr. Gallagher: Well, matters kept of record are not self-serving declarations and are not hearsay.

Mr. Rountree: Also, it is an attempt to vary the terms of a written instrument.

Mr. Gallagher: That is not correct, your Honor, because the contract says the Fox West Coast Theatres shall employ the personnel of the theatre, not as agent, but as Fox West Coast Theatres, and under the California law in the Civil Code, when an agent employs a sub-agent, the agent is not the agent of the agent, but is the agent of the principal.

[56]

(Testimony of John B. Bertero.)

The Court: Is not the sole question here the question of whether there was negligence in the operation of this theatre described by the plaintiff on the part of the individual corporation who was operating the theatre at that time, and what was done with reference to what are called ushers, or whatever they call them, in that theatre?

(Argument of counsel.)

The Court: Going back to this payroll exhibit of some sixteen or seventeen pages, I don't believe that all of this is material. Now, we have part of the April employment, which was after the accident. I don't believe it makes any difference in this case what the defendants did after the accident, in May or June, 1940. I don't think it makes any difference what they did before. I think, if it is admissible at all for the purpose counsel stated, it should be limited to the day or, if more convenient, to the week in which the accident occurred. I don't think this plaintiff is bound by something that happened in April following the accident.

Mr. Gallagher: No; she is not, your Honor, and I am sorry if I handed to your Honor any of the payroll for April, but I do believe that all of March, 1940, would be material for the reason that the plaintiff has testified in this case that some part of the chair broke on the 24th day of March, 1940. Now, in argument they

(Testimony of John B. Bertero.)

might claim, 'While it is true that the defendant showed here that all of the employees of the theatre in the week of the accident were employees of Fox U. A. Venture, why didn't they bring in evidence to show who were the employees from the 1st of March? That is the time when we contend that inspection would have discovered the defect,' and that is why I want to show the entire month of March to and including the 24th day of March, and I will restrict the offer, if your Honor please, to those payrolls which have reference to the month of March, 1940, up to and including the 24th day of March, 1940. [57]

The Court: All right. They may be admitted.

Mr. Gallagher: May we segregate those later, your Honor, from the parts that come afterwards?

The Court: Yes.

(After a suspension of five minutes.)

Mr. Gallagher: They have now been separated so that they show from the 1st of March through the 24th, but it is necessary, in order to show the 24th of March, to carry through until the 28th of March, because the payrolls cover that week.

The Court: Very well.

The Clerk: That will be Defendants' Exhibit No. C.

(Testimony of John B. Bertero.)

Q. By Mr. Gallagher: Mr. Bertero, I show you copies of an employer's report of taxable wages paid to each employee for the quarter ending March 31, 1940, and ask you if that was taken from the records of Fox U. A. Venture kept in the regular course of business, showing a copy of the employer's report of taxable wages paid to each employee at the United Artists Theatre at 933 South Broadway, Los Angeles, California, as of March, 1940?

Mr. Rountree: We object to that on the ground it is incompetent, irrelevent and immaterial, no sufficient foundation laid.

The Court: Overruled.

A. Yes, sir.

The Clerk: That will be Defendants' Exhibit D.

Mr. Rountree: I am not sure I understand what was offered.

Mr. Gallagher: I offered copies of the social security tax returns in evidence.

Mr. Rountree: I object to them on the ground they are incompetent, irrelevant and immaterial and hearsay, and I point out that they are records of apparently some organization not a party to this litigation, and on the further ground there is no sufficient foundation laid.

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(Testimony of John B. Bertero.)

The Court: Overruled.

Mr. Gallagher: Will your Honor bear with me while I confer with counsel?

The Court: Yes.

(Conference between counsel.)

Mr. Gallagher: That is all.

Redirect Examination

Q. By Mr. Rountree: Mr. Bertero, is this Fox U. A. Venture a corporation? A. No.

Q. As I understand it, it is a fictitious name set up for bookeeeping purposes to carry out the terms of the contract, Plaintiff's Exhibit No. 5.

Mr. Gallagher: Just a minute. That is objected to on the ground it is immaterial what counsel understands, and in the second place, it calls for an opinion and conclusion of the witness with reference to carrying out the terms and provisions of a contract.

The Court: That objection is good. It will be sustained, but he may explain just exactly what this thing is, and what relation it has.

Q. By Mr. Rountree: Can you tell us just what Fox U. A. Venture is?

A. Fox West Coast Theatres Corporation and United Artists Theatre Circuit, Inc., jointly are entitled to the proceeds from the operation of several theatres, including United Artists Theatre downtown, and books of account are kept for the two parties and expenses are paid

(Testimony of John B. Bertero.)

by the two parties out of a common fund, and they receive the residium or whatever is left from the operation of those theatres.

Q. Is that the same fund from which the Fox West Coast Agency obtains its money?

A. Its handling fee, or whatever you may call it, of 5.25 per cent which it receives, is ob-

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tained from the same fund, yes, sir.

Q. And all of the proceeds from the United Artists Theatre are put into this fund, is that right? A. Yes.

Q. And it was upon that fund that you, as assistant secretary of the Fox West Coast Agency Corporation, signed certain checks?

Mr. Gallagher: Just a minute. We object to that on the ground that it is two questions in one, to wit: As assistant secretary of the Fox West Coast Agency Corporation, and signing checks.

The Court: It is a double question. Sustained.

Q. By Mr. Rountree: You previously testified that you had signed checks upon some fund?

A. On the Venture; the Fox U. A. Venture bank accounts.

Q. Did you sign those as assistant secretary of the Fox West Coast Agency Corporation?

Mr. Gallagher: That is objected to on the

(Testimony of John B. Bertero.)

ground it calls for an opinion and conclusion of the witness. The best evidence of that is the authority at the bank to sign, and who gave him that.

Q. By the Court: How did you sign the checks?

A. The check has on it—I think Mr. Gallagher has one—it shows 'Fox U. A. Venture, by .....', and it provides for two signatures. I think there are four parties who could sign on one side of the check and four on the other side of the check, and I am one of the parties who signed.

Q. No designation except just the individual names?

A. If your Honor please, I don't know whether you understood it as the Fox U. A. Venture being two parties.

Q. By Mr. Rountree: I hand you a check which has been handed to me by Mr. Gallagher, upon which is printed 'United Artists Theatre'.

Mr. Gallagher: Contingent fund, is it not?

Mr. Rountree: Let me get through describing it, please.

Q. —drawn upon the North Spring Street Branch of the Bank of America, and drawn

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upon the United Artists Theatre, Contingent Fund. There are two signatures. Can you tell me those names?

(Testimony of John B. Bertero.)

A. The first one is Thomas D. Sorerio and the second one is Jordan Sergeant.

Q. Now, is it that United Artists Theatre contingent fund where the proceeds from the United Artists Theatre are deposited?

A. May I explain the mechanics of how the funds are handled?

Q. Well, first, let me get the record clear on this particular question.

A. Will you let me have the question?

(Question read by the reporter.)

A. The funds of the United Artists Theatre are deposited in that account, yes, sir.

Q. By Mr. Rountree: Do you have authority to draw upon that account?

A. Yes. I will qualify that. To the best of my recollection, I have. I have not signed checks on that account for a long time.

Q. By Mr. Gallagher: What was the answer?

A. I have not signed checks on that account for a long time, and I don't recall whether I have authority to sign on that account, but I believe I have.

Q. By Mr. Rountree: In what capacity did you sign checks upon that account?

Mr. Gallagher: That is objected to on the ground it calls for his conclusion and opinion. The check would be the best evidence of the apparent authority, if any, and it invades the province of the court, likewise it is an attempt

(Testimony of John B. Bertero.)

to vary the provisions of a contract by parol evidence.

The Court: I am inclined to sustain that.

Q. All money of United Artists Theatre is placed in this contingent fund? A. Yes.

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A. Yes.

Q. And the only way it can get out of that fund is by check? A. Yes, your Honor.

Q. And out of that fund the money is paid where?

A. Certain expenses are paid by the theatre manager. After paying certain local expenses, the balance remaining in the fund is transferred to an account entitled 'Fox U. A. Venture Fund' in the Washington and Vermont branch of the Bank of America. Certain other expenses are paid out of that account, and at certain periods distributions are made to the owners of that account, Fox West Coast Agency, Fox West Coast Theatres and United Artists Theatres Circuit, Inc.

Q. By Mr. Rountree: What about the Fox West Coast Agency?

The Court: He got that first. It got its share in the check for 5.25 per cent.

A. Yes, your Honor.

Q. By Mr. Rountree: Was there any written agreement that you know of designating what the Fox U. A. Venture was or should do?

(Testimony of John B. Bertero.)

A. I am afraid I don't follow you, Mr. Rountree.

Q. Well, was there any written agreement between the Fox West Coast Theatres Corporation and United Artists Theatre—is that United Artists Theatres Circuit, Inc.?

A. Yes.

Q. And the Fox West Coast Agency Corporation. Was there any written agreement whereby the Fox U. A. Venture was set up or created——

Mr. Gallagher: That is objected to on the same ground; it is ambiguous. Counsel started two or three questions and he has referred to Fox West Coast Agency, a corporation, as being connected with the Fox U. A. Venture, and the question, if answered, would make the record very ambiguous. It is compound.

Mr. Rountree: I will withdraw it and ask this:

Q. Do you know if there was a written agreement creating the Fox U. A. Venture?

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A. According to my best knowledge, that was created by Exhibit 5, here in evidence."

(Rep. Tr. pg. 113, line 7 to pg. 123, line 21).

It is stipulated by and between the parties that it would be impracticable to attempt to make a copy

of the payroll sheets and employer's report of taxable wages paid, received in evidence as Defendants' Exhibits C and D, because of the fact that a typewriter cannot duplicate the exact form or contents of said exhibits in the manner in which the contents of said exhibits are set forth therein and also that it would be impracticable to attempt to print the exhibits on the size paper used by printers in the printing of the record on appeal and it is therefore stipulated that the originals of the Defendants' Exhibits C and D be sent to the appellate court in lieu of copies and that the above entitled court may make such order therefor and for the safe keeping, transportation, and return thereof, as it deems proper, and that in preparing briefs in the Circuit Court of Appeals the parties may print in their briefs a narrative of the contents of said exhibits which they or either of them desire to call to the attention of the Circuit Court of Appeals.

It is also stipulated that it is impossible to reproduce by means of a typewriter or printed words Defendants' Exhibits F, G, H and I, said latter exhibits being portions of broken iron, testified by defendants' witnesses to have been part of the seat occupied by the plaintiff in the theater.

PLAINTIFF'S EXHIBIT 6

is as follows:

"In the Superior Court of the State of California, in and for the County of Los Angeles [63]

JEAN L. FORSYTHE,

Plaintiff

vs.

FOX WEST COAST AGENCY CORPORATION, a corporation, John Doe Company, a corporation, Richard Roe, Ltd. a corporation, John Doe and Jane Doe,

Defendants

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES

Comes Now the plaintiff and for cause of action against the above named defendants, and each of them, alleges:

I.

That during all the times herein mentioned the Fox West Coast Agency Corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly licensed to do business in the State of California, with its principal place of business in the County of Los Angeles, State of California.

II.

That the defendants John Doe Company, a corporation; Richard Roe, Ltd., a corporation, John Doe and Jane Doe are sued herein under fictitious names as their true names are unknown to plaintiff herein, and plaintiff asks permission upon ascertaining the true names of said defendants to insert their true names in lieu of said fictitious names.

III.

That during all the times herein mentioned, the defendants, John Doe Company and Richard Roe, Ltd. have been and now are corporations organized and existing under the laws of the State of California, with their principal place of business in the County of Los Angeles, State of California.

IV.

That the defendants, and each of them, operate and maintain a motion picture theater known as the United Artists Theater open for [64]
the general public to view motion pictures, said theater being located in the City of Los Angeles, County of Los Angeles, State of California.

V.

That plaintiff on or about the 24th day of March, 1940, paid an admission to the afore-

said theater located on South Broadway in the City of Los Angeles, County of Los Angeles, State of California, to view a motion picture offered by said defendants to the general public; that plaintiff was shown to a seat in said theater by an attendant and/or employee of the defendants herein; that due to the carelessness and negligence of the defendants, and each of them, and their employees, plaintiff upon sitting on said seat was violently precipitated to the floor of said theater, by reason of the broken condition of said seat and the collapsing thereof, all of which caused her great pain and severe shock to her nervous system, bruises, abrasions and contusions, and a severe strain and wrenching of her lower back, all of which was the direct and proximate result of the carelessness and negligence of the defendants aforesaid; that plaintiff is informed and believes that the above named injuries are permanent, all to her damage in the sum of Twenty Thousand Dollars ($20,000.00).

VI.

That as a result of the injuries sustained by the plaintiff, as aforesaid, plaintiff was forced to incur doctors and physicians services in the reasonable sum of $217.50; nurses hire in the sum of $187.51; hospitalization and ambulance hire in the sum of $165.97, medicines, medical supplies and supports in the sum of $112.95, all to her damage in the sum of $683.93.

That plaintiff will be forced to incur further expenses for treatment of said injuries and will ask leave of court to amend this complaint to include said further expenses incurred.

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VII.

That plaintiff at the time of said injury was employed and receiving compensation in the sum of $135.00 per month, and that by reason of the injuries aforesaid, plaintiff was compelled to and did remain away from her work for a period of two months, all to her damage in the sum of $270.00. That plaintiff is still unable to work at this time and for an indefinite time in the future, and will ask leave of this court to amend this complaint to include her damage for loss of wages.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of Twenty Thousand Dollars ($20,000) general damages; for the sum of Nine Hundred Fifty-Three and 93/100 Dollars ($953.93) special damages, and for a further sum as special damages to be ascertained at the time of trial, together with her costs of suit herein incurred, and for such other and further relief as to this court may seem meet and just.

ROSECRANS & EMME

By OTTO J. EMME

Attorney for plaintiff.

State of California,
County of Los Angeles—ss.

Jean L. Forsythe being by me first duly sworn, deposes and says: that she is the Plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of his (her) own knowledge, except as to the matters which are therein stated upon his (her) information or belief, and as to those matters that he believes it to be true.

JEAN FORSYTHE

Subscribed and sworn to before me this ..... day of May, 1940.

.....

Notary Public in and for the County of Los Angeles, State of California." [66]

PLAINTIFF'S EXHIBIT No. 7

"In the Superior Court of the State of California in and for the County of Los Angeles

No. 452-891

JEAN L. FORSYTHE,

Plaintiff

vs.

FOX WEST COAST AGENCY CORPORATION, a corporation, et al.,

Defendants

ANSWER

Comes now the defendant Fox West Coast Agency Corporation, a corporation, and answers plaintiff's complaint as follows:

I.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraphs II, III, VI and VII of said complaint and placing its denial thereof upon said ground, denies said allegations and each thereof.

II.

Defendant denies each and every allegation contained in paragraph V of said complaint from and including the word 'that', line 20, page 2 to and including the figures '($20,000.00)', line 32, page 2 of said complaint.

III.

Defendant denies that plaintiff has been damaged in the sum of $20,953.93 or in any other sum whatsoever or at all. [67]

As and for a First, Separate and Special Defense, defendant alleges that on or about the 24th day of March, 1940, the plaintiff so negligently, carelessly and recklessly conducted herself while in the United Artists Theatre in the City of Los Angeles, California, immediately prior to and at the time she seated herself in a certain seat in said theatre, that any injury or damage sustained by plaintiff was a proximate result of said negligence, carelessness and recklessness on her part.

As and for a Second, Separate and Special Defense, defendant is informed and believes and therefore alleges that the plaintiff, at all times mentioned in her complaint, was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew or should have known that seats in theatres and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theatre was designed for the purpose of accommodating a person of the grossly exces-

sive weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in defendant's theatre in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff. [68]

Wherefore, defendant prays that plaintiff take nothing by her said complaint and that defendant have judgment for its costs incurred and to be incurred herein.

LASHER B. GALLAGHER
Attorney for defendant Fox West Coast Agency Corporation, a corporation.

State of California,
County of Los Angeles—ss.

John B. Bertero, being by me first duly sworn, deposes and says: that he is the Assistant Secretary of Fox West Coast Agency Corporation, a corporation, one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own

knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN B. BERTERO

Subscribed and sworn to before me this 28th day of June, 1940

ANN FRIEDLUND

Notary Public in and for the County of Los Angeles, State of California." [69]

It is further stipulated that all defendants' exhibits, from and including Defendants' Exhibit E, were offered and received in evidence during the presentation of defendants' case and that Defendants' Exhibits C and D were offered and received during the presentation of plaintiff's case and that all of plaintiff's exhibits, excepting Plaintiff's Exhibit 8 were introduced in evidence during the presentation of plaintiff's case in chief.

It is further stipulated that exhibits which are not specifically referred to in this Statement of the Case are not material to a consideration of any point involved in this case on appeal.

Before proceeding to introduce evidence in its defense, the defendant Fox West Coast Agency Corporation moved to strike from the record all evidence which was received over the objections made at the time the evidence was offered, upon the same grounds as specified in the objections prior to the time the evidence was received.

With reference to the said motion, the following proceedings occurred:

"In making the motions, the defendants are not, and neither of them is, making a conjunctive motion, with the thought that each and every bit of evidence must be stricken or else none shall be stricken. Each motion relates to each specific piece of evidence which was received over objection, and I ask your Honor at this time whether the Court would prefer that we go back over each particular bit of evidence and make a specific motion to strike as to each, or whether your Honor has the record sufficiently in mind to pass upon a motion in the form in which I make it. I don't want to burden the Court with recollection. I am merely trying to save time.

The Court: Whichever way counsel wishes to proceed.

Mr. Gallagher: All right. Then by reference to each objection made which was overruled, at this time I make a specific motion to strike

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the evidence which was received over such objection upon each and every ground stated in the objection before the evidence was received. I make that motion in behalf of the defendants jointly and severally.

The Court: Overruled."

(Rep. Tr. pg. 125, lines 5 to 24).

Before proceeding to introduce any evidence in its defense the defendant Fox West Coast Agency Corporation made a motion for a dismissal of the action as follows:

> "Mr. Gallagher: Now, at this time the defendants, and each of them, move the Court for a dismissal of the action on the ground that upon the facts and the law the plaintiff has shown no right to relief. That motion is made by reason of Rule 41 of the Rules of Civil Procedure."

(Rep. Tr. pg. 125, line 25 to p. 126, line 3).

* * * * * * *

(The matter omitted has reference solely to the Fox West Coast Theatres Corporation).

> "The defendant Fox West Coast Agency Corporation moves the Court for a dismissal of the action so far as it is concerned upon the ground that there is no proof of the existence of the relationship of business invitor and business invitee as between the plaintiff and the Fox West Coast Agency Corporation.
>
> The defendant Fox West Coast Agency Corporation moves the Court for a dismissal upon the ground that there is no proof of any facts showing the existence of any duty owing by the Fox West Coast Agency Corporation to the plaintiff.
>
> The defendant Fox West Coast Agency Corporation moves the Court for a dismissal as

to it upon the ground that there is no proof of the breach of any duty owed by the Fox West Coast Agency Corporation to the plaintiff."

(Rep. Tr. Pg. 126, line 19 to pg. 127, line 6).

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* * * * * * *

(The matter omitted has reference solely to the Fox West Coast Theatres Corporation).

"Each of the defendants, jointly and severally, moves the Court for a dismissal of the action upon each ground as follows:

First: There is no evidence sufficient to establish any negligence on the part of the defendants, or either of them.

Second: There is no evidence sufficient to establish any actionable negligence on the part of the defendants, or either of them.

Third: There is no evidence to establish actionable negligence on the part of the defendant Fox West Coast Agency Corporation".

* * * * * * *

(The matter omitted has reference solely to the Fox West Coast Theatres Corporation).

"Mr. Gallagher: Very well. Now, with reference to the Fox West Coast Agency Corporation, I call to the Court's attention the rule of law pertaining to the obligation, if any, of one who has employed an agent in and about the conduct of the business of another.

(Argument of counsel.)

Mr. Gallagher: Now, the only way in which

the plaintiff can hope to prevail upon the Court not to dismiss the action so far as proof of negligence is concerned is by resort to the doctrine of res ipsa loquitur and the case is barren of any evidence which would justify or warrant the application of res ipsa loquitur for the following specific reasons:

First: There is no evidence proving or tending to prove exclusive control of the theatre in either defendant, particularly in Fox West Coast Agency Corporation, a corporation.

Second: There is no evidence in this case showing that when a person who is as big as

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the plaintiff was at the time of this accident sits in a chair, in whatever manner she sat in the chair, such chair will not break unless somebody has been guilty of negligence. By that I mean there is no general experience of mankind which would show that when a woman weighing 300 pounds sits in a chair in a theatre, which chair is narrower than her body is at the hips, that such chair will not collapse or break, in the absence of some negligence on the part of whichever defendant had the duty of maintaining the chair in a reasonably safe condition.

Therefore, I contend that the doctrine of res ipsa loquitur is inapplicable, and I respectfully submit the motions.

The Court: The motions will be denied."

(Rep. Tr. pg. 127, line 11 to pg. 129, line 14).

HARRY L. WALLACE,

produced as a witness on behalf of the defendants, testified as follows:

My name is Harry L. Wallace; I have resided in Los Angeles about nineteen years. In the month of March, 1940, I was assistant manager in the United Artists Theater at 933 South Broadway, Los Angeles. The nature of my work was the duties that assistant managers in theaters perform. As part of my work I prepared the payroll records showing the employees at that theater. Defendants' Exhibit C was prepared by myself in rough copies and the rough copies were typed by the secretary there at the theater.

Those payroll records truly and correctly reflect the names of each and every person who worked in that theater during the month of March, 1940; this is the payroll complete and included the names of all persons who performed any work of any kind in that theater.

Arthur Roberts was the head janitor in the month of March, 1940. Paul Seman, Robert Arroyo and Vance Cudd were all full time janitors. Arthur Roberts was janitor and Carl Zeich; these men did

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janitor work. They come there after the show is over at night. They turn up the seats, sweep out the papers, do the necessary vacuum work, scrubbing and cleaning and mirror work, etc.; strictly janitor work.

(Testimony of Harry L. Wallace.)

Those seats would not come up without someone lifting them up; you have to push the seats up. That would be done by the janitors at that time twice a day; that is, 12:30 at night and at 5:45 during the day.

Prior to Easter Sunday, which occurred in March, 1940, there had been detailed inspection of the seats and other equipment in that theatre. The Picture, "Gone with the Wind" had been showing in that theatre since December 29th, 1939. Between December 29th, 1939 and March 24th, 1940 there had not been a shutdown; the house was operating at all times.

There had been an inspection of the equipment in general, that is, the seats and everything like that others in addition to the janitors between December 29th, 1939 and March 24th, 1940, daily. Those who made the daily inspection were myself and Mr. Corley, who was the floor man, and certain girls designated to certain sections in the theatre to inspect.

My inspection was merely walking through the rows and taking the hand and working the seat up and down. The purpose of my taking hold of the seat and working it up and down was to see if the seat was loose.

In addition to the inspections made by me and Mr. Corley and the janitors during the period mentioned the usherettes made inspections.

On March 24th, 1940, or prior to the time that

(Testimony of Harry L. Wallace.)

Miss Forsythe claims she was injured, I had not noticed anything wrong with the seats in the row that she was then occupying.

Miss Forsythe did not talk to me at all on March 24th, 1940. I did not see her at all. [74]

I recall the picture schedule. We had two shows during the day. We had a show starting at about 9:45 and running until 1:30; then another show starting about 1:45 and running until 5:45; and that is the time that the house empties; that is our break; no one in the house at all until 7:30, and the house would open again and start at 8:00 and run until 12:00. What I mean by a break is the end of the complete showing of the picture in the morning, and between that time and the time the picture is run for the second time that day.

During the period from the finish of the showing of the picture at the morning show and the starting of the showing of the picture in the afternoon, the theatre lights are full up inside; it is just as bright as can be.

Now, with reference to Easter Sunday in March, 1940, I was at the theatre that morning. The condition, with reference to whether the seats in the downstairs portion were or were not occupied during the morning show is that the house was completely full; as we call it, full check. When I say full check, that means not a seat in the theatre; it means the usherettes have filled every seat. I

(Testimony of Harry L. Wallace.)

mean there are no more vacant seats; no more people to come in; we stand them outside.

Ever seat in that theatre was occupied from about 9:45 A. M. until about 1:30 P. M. by persons who were viewing the picture, which was, "Gone with the Wind". From 9:45 to about 9:55 it would be filling up; there was a news reel. We open up the box office at 9:15 and we get a heavy fill then and then the news reel comes on and we get a fill there, and then we close down the doors and sell box office tickets for the next show. In other words, say our house would open at 9:15; we start at 9:45 with the news reel, and that gives us an additional fifteen minutes to fill up. "Gon*d* with the Wind" started at 9:55 and from 9:55 until 1:30 all of the seats were filled on that morning. [75]

I had occasion to look at the seat which had been occupied by Miss Forsythe after some accident happened. That was about 7 o'clock, when I came back.

It is stipulated that photograph, Plaintiff's Exhibit No. 1, may be transmitted to the Clerk of the Circuit Court of Appeals with the same force and effect and for the same reasons which have heretofore been stated in stipulations with reference to other exhibits which it is impracticable to copy.

(Witness Wallace continuing):

"Q. Had you ever seen it when it had been broken? A. Yes, sir.

Q. Could you tell from an inspection of that

(Testimony of Harry L. Wallace.)

cast iron part whether the break was new or old? A. Yes, sir; I believe I could.

Q. What was the condition with reference to that break in that metal part?

Mr. Rountree: We object to that as calling for a conclusion of the witness and no proper foundation laid.

The Court: Sustained.

Mr. Gallagher: I would like to make an offer of proof. We offer to prove by the testimony of this witness that the only parts of the chair which were broken were metal parts and that those metal parts were cast iron, and that the breaks in the cast iron were fresh breaks, and I make that offer on the theory that any lay witness can testify whether a break in a piece of metal appears to be a fresh break or an old break.

Q. Mr. Wallace, did you have a social security record and card at the time we are referring to, the month of March, 1940?

A. Oh, yes, sir.

Q. Do you have that with you?

A. No; I have not.

Q. Do you know what happened to it? [76]

A. I know what happened to half of it. It was thrown away.

Q. Destroyed? A. Yes.

Q. Did you get a new one since then?

A. No. I had no need for it.

(Testimony of Harry L. Wallace.)

Q. Well, who paid you? That is, where did you get your salary?

A. Fox U. A. Ventures.

Q. That is the same entity that was referred to by Mr. Bertero when he was testifying here, the Fox U. A. Venture?

A. Yes, sir.

Q. Did you ever receive any salary from the Fox West Coast Agency Corporation?

Mr. Rountree: We object to that as calling for a conclusion of the witness.

The Court: He may just tell how he was paid and by what method and what checks.

Q. By Mr. Gallagher: Do that.

A. I received my check at a certain time in the week from the United Artists Theatre, and that is the only check I ever received as long as I worked at the United Artists Theatre.

Q. That is, you received checks which were signed 'United Artists Theatre, Contingent Fund, by——' A. By the management.

Q. Two names?

A. Two signatures, Tom Sorerio and Jordan Sergeant.

Q. Did you sign any checks yourself?

A. No, sir.

Q. By the Court: Who employed you?

A. By the management; Tom Sorerio.

Q. The manager of what?

A. Of the United Artists Theatre. [77]

(Testimony of Harry L. Wallace.)

Cross Examination

Q. By Mr. Rountree: How many seats are there in the house downstairs? A. 1082.

Q. Do you personally inspect the 1082 seats every day? A. No, sir.

Q. Did you inspect any seats on Easter Sunday in 1940? A. Yes, sir.

Q. What seats did you inspect?

A. The center section, half of it.

Q. What is that?

A. Half of the center section.

Q. Which half? A. The lower half.

Q. How many seats would that include?

A. To break that down that way, I wouldn't know.

Q. How many rows would it be?

A. That would include about thirteen or fourteen rows.

Q. And you did not observe what the usherettes did in the way of inspection, did you?

A. No, sir.

Q. There was another assistant manager, I believe you said? A. No; I did not.

Q. You are the only assistant manager?

A. Yes; a manager and assistant.

Q. Did you observe what anyone else did with reference to inspection of the seats?

A. You mean while they were doing it?

Q. Yes. A. No.

(Testimony of Harry L. Wallace.)

Q. So you don't know whether they actually inspected them or not, do you? [78]

A. Oh, yes.

Q. That is, of your own knowledge?

A. Unless I walked around with every usherette. I could see them going through the motions of it while I was with them.

Q. Would they be in the same part of the theatre you were or in some other portion of the theatre?

A. No; we all inspected them at the same time.

Q. You say they walked through the aisles?

A. Going through the same motion I was going through, and I was inspecting the seats.

Q. Were you in the theatre on the afternoon of Easter Sunday in 1940?

A. The afternoon of Easter Sunday? No; I left at two o'clock.

Q. Do you have the pieces of the seat you found broken?

A. Personally, no, I have not.

Q. What did you do with them?

A. That I don't know. The manager took care of the parts of the seat after I turned them in to him.

Mr. Gallagher: I have sent for them. I know where they are.

Q. By Mr. Rountree: By the manager, I take it, you mean Mr. Sorerio?

(Testimony of Harry L. Wallace.)

A. Mr. Sorerio.

Mr. Rountree: That is all.

Redirect Examination

Q. By Mr. Gallagher: What row was this seat in, the one that was broken?

A. Thirteen rows from the front.

Q. Was that within the seats that you inspected that day?

A. I would have hit that row and one right back. [79]

Q. In other words, it was included in the seats that you inspected that morning?

A. It was included.

Q. Was that seat all right in the morning when you inspected it? A. Yes, sir.

Mr. Rountree: We object to that as calling for a conclusion of the witness.

The Court: Yes; and no foundation laid. The witness would have to testify that all these five hundred or one thousand seats that he knew of of his own knowledge he had personally inspected he had personally inspected this particular seat.

Q. By Mr. Gallagher: What did you do with reference to the seats that were within the section that you inspected that morning?

A. I made the normal inspection of the seats, which might have been 200 or 250 seats in that section that I checked.

(Testimony of Harry L. Wallace.)

Q. And you don't know whether you checked this particular seat or not?

A. I checked every seat. The procedure is walking through a row as you check. That is, the thirteen or fourteen rows as you go.

Q. And you touch the seat?

A. You touch the seat with your right hand going through and your left hand going through the other way; grab hold of the seat as firmly as you can, and if there is any looseness in the seat you can detect——

Mr. Rountree: I object to that as *c* conclusion. What he actually did, I do not object to.

Mr. Gallagher: What I am trying to find out is whether the witness took hold of each seat or each chair in that section, or whether he took hold of only a small portion of the chairs in that section, and I still don't understand what he did. Will you resume the witness

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stand so we can find out definitely?

A. By the Court: Two rows at a time, as I understand it?

A. No; one row at a time.

Q. By Mr. Gallagher: You have testified that the seat in which the plaintiff was sitting at the time of the accident was within the portion which you inspected that morning?

A. That is correct.

(Testimony of Harry L. Wallace.)

Q. Now, getting to the next point; did you personally inspect the seat of each chair in that portion that morning? A. Yes, sir.

Q. Was there anything wrong that you could find with any seat in any chair in that section?

A. No, sir.

Q. Did they all appear to be tight to you?

A. They did.

Mr. Rountree: We object to that as calling for a conclusion of the witness and incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. By Mr. Gallagher: Now, if any seat had a cast iron connection which was broken asunder, would the seat still raise up and down?

A. No, sir.

Mr. Rountree: We object to that as calling for a conclusion of the witness.

The Court: Overruled.

The Witness: No, sir.

Q. By Mr. Gallagher: When you saw this seat after this accident happened, you have testified that some part of the metal shown in this picture had been ripped clear out of the seat portion itself? A. Yes, sir.

Q. Will you point out to his Honor what you refer to when you say the metal part was broken? [81]

A. This part right here (indicating).

Q. That is the cantilever part?

(Testimony of Harry L. Wallace.)

A. That sets out under the wood part of the seat, and that is the part that hinges on the upright; this is the upright, and there is a hinge here. (Indicating). Those two parts were broken. It was snapped here (indicating).

Q. In other words, this piece of metal extends both in front of the hinge and in back of the hinge? A. That is right.

Q. And the under surface of the seat is fastened to the upper surface of this metal which shows here in the photograph?

A. That is right.

Q. And is the hinge located right at the place where you can see this little portion of a circle?

A. Yes. That is where the little circle is in the rib there.

Q. And you say that not only was the metal part of the fixture which shows in the picture broken, but a portion back of the hinge as well?

A. Yes.

Q. And when you say part of it was torn out of the wooden part of the seat, do you refer to this same piece of metal which acts as both a hinge and a support?

A. No; when this broke, it left the seat down.

Q. We are not trying to establish what happened when it broke.

A. You want to know what the seat looked like when I got there?

(Testimony of Harry L. Wallace.)

Q. Yes. Was the seat separated from the metal on the left hand side when you got there?

A. No. This portion was still on the seat (indicating). [82]

Q. Just the portion that sticks out in front of the upright in the seat in the picture?

A. That is right.

Q. But the back portion of that metal support—where was that?

A. Well, that was just laying separate.

Q. Was that screwed into the wooden seat originally? A. No.

Q. Well, what held the wooden seat onto this metal?

A. Screws. This hinge runs back, and this hinge here (indicating)—there is a double hinge.

Q. Will you take that open and continue the hinge on back, to get an outline of it, back as far as you think it goes, and show its shape?

A. Well, I would say something like that (indicating). This is the seat here; this is the seat (indicating).

Q. The seat continues on back, too?

A. Yes.

Q. Now, I will mark this portion X, that you drew as the rear portion of the support, and the hinge as X-1, and the seat cushion itself as X-2. Now, the screws, you say, which held the seat cushion and the wooden frame, which

(Testimony of Harry L. Wallace.)

is a part of the seat cushion, to this metal support and hinge, were in this portion marked X- and also in this front portion?

A. The front portion, yes.

Q. Well, we will mark the front portion of that hinge as X-3. Was the hinge or support broken on the other side of the chair, or just on one side? A. Just on one side.

Mr. Gallagher: That is all.

Recross Examination

Q. By Mr. Rountree: Does not the portion which is marked X, the continuation of the steel

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base, in fact simply run along as a flat base underneath the seat? Do you understand what I mean?

A. Yes; it is a continuation of the front casting it sets on.

Q. Is it the same shape as that marked X-3?

A. No; it is just about like I drew it there.

Q. Well, calling your attention to the seat, apparently in the right back of the chair, which has been marked as X-1, X-2 and X-3, to which you have previously referred, I will ask you if that is not a picture which shows the whole support?

A. It is not a clear one, no. In fact, it is a very poor one. You may see what you are overlooking, if you will look close; the hinge still

(Testimony of Harry L. Wallace.)

runs back of the seat. You miss it in here (indicating). You see, this is a hat rack (indicating).

Q. I will ask you if this portion marked X-3 is not generally L-shaped? A. No; it is not.

Q. Counsel has handed me a picture, and I will ask you if the hinged brace shown in that picture is the same as was on the chair which you found broken?

A. It is a little different in construction. That is the right-hand side of the chair. The rights and lefts are a little different. You see the difference here (indicating). This is the left and this is the right. The right-hand side goes into the left on top. That gives you a good picture of the top.

Q. But in so far as the base of the support, which is actually against the wooden part of the seat, would they be the same?

A. Yes; about the same.

Q. Calling your attention to the light mark in the picture—— A. That is a screw.

Q. Is that a screw? A. That is a screw.

Q. Then would you say that there was or was not a screw on the portion of the brace

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which you have marked X on Plaintiff's Exhibit No. 1?

A. Yes; there is a screw back of that hinge.

Mr. Rountree: Do you want to introduce

(Testimony of Harry L. Wallace.)

this as your exhibit or shall I introduce it as mine?

Mr. Gallagher: Either way. Go ahead.

Mr. Rountree: I ask that this photograph be introduced as the next exhibit in order.

The Clerk: Plaintiff's Exhibit No. 8.

Q. By Mr. Rountree: None of the seat shown in Plaintiff's Exhibit No. 8 is the particular seat that was broken on this Easter Sunday, or are you able to tell whether it is or is not?

A. I thought you were telling me it was not.

Q. No; I am asking you.

A. I was present when the picture was taken, and that is the seat.

Q. After it had been repaired?

A. Yes; after another hinge was put on.

Q. Was it a corresponding piece which you found separate and apart from the wooden part of the seat——

A. You are on the wrong hinge again, sir. This hinge was not broken. They are entirely different. This one was broke at the left side of the second seat (indicating).

Q. But the construction as between the left and right is entirely different?

A. Yes; it is different. You can see that in here (indicating). There is a little difference in structure. This is marked R (indicating) and

(Testimony of Harry L. Wallace.)

then it is marked different here, so you can get them up right.

Q. And on the back part of the brace, are they the same or different?

A. I think they are just about the same. That is, if you [85] are working from the hinge, and then three or four inches that extends back here, I imagine that is the same. It appears to be the same.

Q. Was that the three or four inches back of the hinge that you found separate and apart from the seat?

A. No. This is the part I found separate from the seat (indicating).

Q. By 'this part,' you refer to what? The hinge?

A. As I explained before, this is in two parts, as this picture shows. This is the left side here (indicating).

Mr. Rountree: I don't think the Court is getting that.

The Court: I think I understand it. I have sat in those seats.

Q. By Mr. Rountree: Do I understand the hinge broke?

A. Yes; the brace broke and the hinge broke; two different pieces.

Q. Your examination consisted of taking hold of that part of the seat when it was in an upright position?

(Testimony of Harry L. Wallace.)

A. Throwing it down and throwing it back up, and if there was any looseness, it would show up.

Mr. Rountree: I move to strike the last part of the answer as not responsive.

The Court: It may go out."

(Rep. Tr. pg. 146, line 16 to pg. 160, line 26).

CONNIE MILLER,

produced as a witness on behalf of defendants, testified as follows:

I recall the day when the plaintiff had an accident at United Artists Theatre at 933 South Broadway, Los Angeles. At that time my name was Connie Mandel. My occupation at that time was usherette. I do not recall seeing Miss Forsythe, the plaintiff in this case, until she came up to me and reported the accident. [86] I saw the plaintiff in the theatre that day a little after 4 P.M. in the afternoon.

On that day I had on a particular uniform or dress; it was a pink hoop skirt; an old fashioned hoop skirt, somewhat resembling the gowns worn in the picture. All of the other usherettes were dressed somewhat similarly that day. That was Sunday and there was a girl on the mezzanine floor, a girl on the balcony and a girl on the main floor. I was working on the main floor.

ROBERT ARROYO,

produced as a witness on behalf of defendants, testified as follows:

I live at 2513 Trinity; I am thirty-one years old. On the 24th day of March, 1940, I was working at the United Artists Theatre at 933 South Broadway as a janitor. I knew the other janitors who worked in that theatre at that time. The same crew which was working on March 24th, 1940, had been working there for a long time before that and for a long time afterwards.

"Q. By Mr. Gallagher: What did you do when you were engaged in cleaning out the theatre and when people had gone away and the picture was not being shown any more?

A. Well, we started sweeping under the seats.

Q. How about the aisles of the theatre? Were they swept, or not?

A. They were vacuumed.

Q. How about the seats themselves? Was anything done with reference to cleaning them?

A. Yes.

Q. What?

A. They were being cleaned every night, under them.

The Court: Just what you did; not what somebody else did.

A. I did that, too.

The Court: Proceed. [87]

(Testimony of Robert Arroyo.)

Q. By Mr. Gallagher: In cleaning the seats and cleaning under the seats, did you take hold of any part of the seat? A. Yes.

Q. Would you tell the judge what you did in cleaning about the seats?

A. Well, if they were down we had to raise them up?

Q. Why?

A. Well, after we got through cleaning we had to raise the seats; that is, every seat individually.

Q. Every individual seat? A. Yes.

Q. Was there any work done in cleaning the seat itself? I mean by that, the surface of the seat, or the arms or backs of the seats.

A. No; we didn't have to do that.

Q. Were you familiar with the work done by the other janitors there in that building while you were working there?

A. They were doing the same work I was doing.

Q. All doing the same work?

A. All doing the same thing."

(Rep. Tr. pg. 175, line 22 to pg. 177, line 6).

In doing my work, if I discovered any seat was loose, we had to report to the manager or one of the men that fixes the seats there in the theatre. That was every-day routine. There are some of the men there that fix the seats.

GOUGH L. CHENEY,

produced as a witness on behalf of defendants, testified as follows:

"Q. By Mr. Gallagher: Mr. Cheney, what is your occupation?

A. Chemist and metallurgist.

Q. How long have you been engaged in that occupation? A. Since 1910.

Q. Have you had occasion to examine metal during that time [88] and during your practice as a metallurgist?

A. I have.

Q. You have in your possession certain pieces of cast iron? A. I have.

Mr. Gallagher: I will state to your Honor that we have testimony to establish that these pieces that were broken on this particular chair at the time of this accident are in the same condition except for age now as they were immediately after the accident, and that will be offered. I am calling Mr. Cheney out of order with that understanding.

Q. Mr. Cheney, when did you first see those pieces of cast iron, approximately?

A. About June, 1940.

Q. Did you have occasion to go to the theatre known as the United Artists Theatre at 933 South Broadway since you got these pieces of cast iron? A. Yes.

Q. And did you there examine the general construction of the seats in that theatre?

(Testimony of Gough L. Cheney.)

A. I did.

Q. I will show you Plaintiff's Exhibit No. 1 and ask you if that photograph represents the type and construction of the seats there. That is, so much of the type of construction as can be seen in the pictures.

A. It does.

Q. Does that picture also show the same kind of device as these pieces of cast iron represented before they had been broken? By that I mean, can you see, on any one of these pictures, a device used for the same purpose as this cast iron piece was used prior to the time of the accident? A. Yes, sir.

Q. Will you point out to his Honor what particular part is [89] similar?

A. The supporting arm here under the seat is similar to this portion here (indicating).

Q. When you say "supporting arm", do you mean the thing on Plaintiff's Exhibit No. 1 which is identified by various letters and figures, X-3, X-1, pointing to the device?

A. The arm is designated as X-3, in particular.

Q. Will you state to the Court whether or not you have an opinion with reference to when these breaks or fractures occurred in point of time or sequence? In other words, did they all occur at once, or did one occur first and then others?

(Testimony of Gough L. Cheney.)

A. From an examination of the fractured surfaces and the *the* specimens, it is my opinion that they occurred practically at the same moment. That is, instantaneously.

Q. Was there any defect in the metal itself which could possibly be discovered by any kind of an examination except a disintegration of the entire fixture or fitting?

A. I found no defect in the metal.

Q. From your examination of the seats in the theatre and these pieces, can you state to his Honor which of the portions of this fitting were the weight-bearing portions, so far as the cantilever effect was concerned?

A. The load was supported by these two surfaces, which fit into a corresponding groove in the frame of the seat, the load being carried by these two pieces, with a bolt holding them in place.

The Court: You had better get those parts numbered so they will be identified.

Mr. Gallagher: I would like to have these two parts just referred to by the witness received in evidence as Exhibits F and G, F being the largest portion and G being the smaller portion, and let the record show that the portion of the casting at the farthest end from the hinge, the smaller section, is the part that [90] was referred to as the weight-bearing portion.

Mr. Rountree: It is so stipulated.

(Testimony of Gough L. Cheney.)

The Clerk: Defendants' Exhibits F and G.

Q. By Mr. Gallagher: Mr. Cheney, from your examination of the seats themselves in the theatre, and your examination and inspection of the mechanical construction and design of the seats, do you have any opinion with reference to what caused the fracture of the pieces marked F and G?

A. My opinion is they were subjected to a load greater than the cross section of the metal would withstand.

Q. Is a piece of metal subjected to a load both by lowering a weight into the seat, and also by impact? A. Yes, sir.

Q. In other words, might a load placed upon a seat in an unusual manner cause a greater strain or stress than the part was designed to hold?

Mr. Rountree: Just a minute. We object to that——

Mr. Gallagher: I will withdraw the question.

Q. Will you explain to his Honor in a little more detail how a part which is apparently sound might break even though the total weight which was involved was less than the total weight which that part would sustain under ordinary circumstances?

A. By sudden impact, or a moving weight, which would give it more foot pounds of en-

(Testimony of Gough L. Cheney.)

ergy, or by reducing the bearing surface on the cantilever, such as would occur by a side thrust, which would push the bearing surfaces away, or which would allow them to move and thereby change the direction of the applied force.

Q. When you say a side thrust, I would like to call your attention to this photograph again and ask you if those arms on those chairs, from your examination and in your opinion, are designed to do anything other than to separate the seat spaces and to provide arm rests? [91]

Mr. Rountree: Just a minute. I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Gallagher: I will withdraw the question.

Q. Mr. Cheney, assuming that a person whose body—that is, hips, were wider than the space between the insides of each arm would fit in such a seat, and assuming that such person would have to force his or her body into that space, have you an opinion with reference to whether or not that would create a side thrust within the general category of the meaning of that term as you have used it?

Mr. Rountree: Just a minute. I object to the question on the ground it is incompetent, irrelevant and immaterial, and no sufficient foundation laid for that type of hypothetical question.

(Testimony of Gough L. Cheney.)

The Court: I will let the witness answer. Overruled.

A. Any side thrust applied to the arms of the chair would have a direct action on the cantilever bearing of the seat bracket.

Q. By Mr. Gallagher: Well, when you say it would have a direct action, what kind of direct action do you refer to?

A. It would throw stresses in there, and it would be hard to determine just what the ultimate effect would be, but the leverage action there would be rather great, as the design of that portion of the seat does not consider absorbing stresses in that direction.

Q. Have you had occasion to become familiar with seats used generally throughout this locality in motion picture theatres from your own personal experience with them?

Mr. Rountree: I will ask that that be answered yes or no.

Q. Yes; in a few instances.

Q. By Mr. Gallagher: Well, have you personally visited motion picture theatres as a patron yourself? A. Yes, sir.

Q. And in that capacity have you had occasion to observe the [92] general type of seats used in such places in this community, and the general construction of those seats?

A. I have in general, but I have never given the different ones any minute inspection

(Testimony of Gough L. Cheney.)

of any type, only in cases where there was some mechanical problem involved.

Q. Well, maybe you did not understand the point of my question. I will try to make it a little more plain. So far as general construction is concerned, and general design, is there any difference between the general construction and general design of the seats in the United Artists Theatre and those in other moving picture theatres throughout the city which you have visited as a patron?

A. Only that this is a typical cantilever type of seat. There may be other types in which the seat moves around on its own bearing, so that the weight is supported by the cantilever, which is away from the axis of the seat, but for this type, this is a common type of seat.

Q. In other words, with reference to the particular type or particular kind of seats used in the United Artists Downtown Theatre, those seats are in conformity with their type?

The Court: Just a minute. That is a leading question.

Mr. Gallagher: I will withdraw the question.

Q. Speaking particularly with reference to the seats in the United Artists Downtown Theatre, state whether or not those seats are in conformity, so far as design and construction is concerned, with cantilever seats?

(Testimony of Gough L. Cheney.)

Mr. Rountree: To which we object on the ground it is incompetent, irrelevant and immaterial.

The Court: I will permit him to answer.

A. It is a typical cantilever construction.

Mr. Gallagher: Now, if your Honor please, the other portions of the seat support which are here I would like to offer in evidence as Defendants' Exhibits H and I, the large part being H and the [93] small part being I.

Mr. Rountree: Are you offering them in evidence or for identification?

The Court: There is no testimony to identify them yet. We will mark them H and I for identification, H being the large and I being the small part.

A. By Mr. Gallagher: I hand you these two pieces of metal and ask you if, as they are fitted together, they were part of the metal mechanism on this seat which was fractured?

A. This particular one is typical of the construction of the of the seat that was fractured.

Q. Was that particular piece of metal, in your opinon, fractured? A. Yes, sir.

Q. Is there any indication of defective metal there?

A. No possible indication of any defect.

Q. In your opinion, did that fracture occur at a time different from the fracture of the other parts marked Defendants' Exhibits F and G?

(Testimony of Gough L. Cheney.)

A. In my opinion they occurred at the same time.

Q. Is this portion you have in your hand a part of the support on the left hand side of one of those seats in that theatre as the person sits in it and faces the screen?

A. Yes, sir.

Q. Have you attempted to fit these two parts together? That is, Defendants' Exhibits F and G and these which have been marked for identification as Defendants' Exhibits H and I?

A. Yes, sir.

Q. Do they fit together?

A. Yes, sir; they are parts of a unit.

Mr. Gallagher: Now, if Your Honor please, I would like to offer in evidence the portions which have been marked as Defendants' [94] Exhibits H and I for identification.

The Court: They may be received.

Mr. Gallagher: You may take the witness.

Cross Examination

Q. By Mr. Rountree: Can you tell me whether these two holes in the end of this piece which I show you, Exhibit H, were made for the purpose of inserting screws, for screws to go into the wooden part of the seat?

A. They appear to be, yes, sir.

Q. Would it have any effect upon the piece of metal—that is, as the seat is used—if one of those screws were missing?

(Testimony of Gough L. Cheney.)

A. May I ask you, do you assume that the load on the seat was placed normally on the seat?

Q. Well, if you can, answer the question generally, and if you want to modify it, you may do so.

A. If the load were placed uniformly on the surface of the seat, the fact that a screw was loose or missing, in my opinion, would not affect the strength of it.

Q. Will you tell me what you mean by uniformly? Does that mean the whole weight over the whole surface of the seat at the same moment?

A. No. A person sitting normally in a seat, so that the weight is supported more or less in the manner for which the seat was designed, rather than a person sitting on the edge of the seat, where they would get an improper action here (indicating), where a screw missing in the back might not offer the support.

Q. Well, if the principal screw were missing——

A. I don't believe that would have any effect.

Q. Do I understand you to say that you think all these fractures occurred at the same instant?

A. As close as anything could happen in sequence. Undoubtedly one particular part

(Testimony of Gough L. Cheney.)

broke first, followed immediately by the other. [95] It may have been a fraction of a second.

Q. But one did occur first?

A. Undoubtedly.

Q. Have you any opinion as to which one occurred first?

A. It is my opinion that the fracturing here occurred first (indicating).

Q. By the Court: Which one is that?

A. The fracture on Exhibit F occurred first, because the fracture on Exhibit H—that portion only acted as a guide; it did not necessarily carry any load itself. In other words, something undoubtedly twisted the seat out of position in order to break the guide.

Q. By Mr. Rountree: Did you form any opinion as to the age of those seats when you were in the theatre? A. No, sir.

Q. Then, as I understand your testimony, it is your opinion that these fractures occurred in Defendants' Exhibits F and H because a greater weight was placed on the seat than it was designed to bear?

A. No, sir. My opinion is that a greater load was placed on the metal than the particular cross-section was able to withstand.

Q. Which cross-section do you refer to?

A. This bearing surface of this cantilever.

Q. Referring to Exhibit F?

A. Exhibit F, yes, sir."

(Rep. Tr. pg. 179, line 9 to pg. 189, line 24).

JAMES E. CORLEY,

produced as a witness on behalf of defendants, testified as follows:

"Q. By Mr. Gallagher: Mr. Corley, what is your occupation at the present time?

A. I am in the United States Army, sir.

Q. Stationed where? [96]

A. In the vicinity of Santa Rosa, north of San Francisco.

Q. In the month of March, 1940, were you employed at the United Artists Theatre at 933 South Broadway in Los Angeles?

A. Yes, sir.

Q. What was your occupation there?

A. I was listed as floor manager.

Q. On March 24, 1940, did you have occasion to examine a seat in row 14 at any time that day?

A. I examined a seat in row 13, sir, the second seat from the end.

Q. In row 13? A. Yes, sir.

Q. Was that a seat that had been involved in an accident concerning this lady here, Miss Forsythe? A. Yes, sir.

Q. What time did you see her first?

A. I could not say the exact minute, but it was sometime approximately about 4:15 or 4:30. In that period.

Q. Did you speak to her at that time?

A. Yes, sir; I did.

Q. Immediately after you spoke to her, or

(Testimony of James E. Corley.)

very shortly after you spoke to her, did you go down and examine the seat?

A. Yes, sir; I did.

Q. I will show you Defendants' Exhibits F, G, H and I and ask you whether you have ever seen those pieces of metal before?

A. Yes, sir; I have.

Q. Where were they when you first observed them in their broken condition?

A. They were in the second seat from aisle 3 in row 13; aisle 3 from the center section.

Q. Was that on March 24, 1940?

A. Yes, sir; it was. [97]

Q. Are those pieces of metal, except for any changes which may have occurred along the fracture lines of the metal, in the same condition as they were when you saw them there in that theatre?

A. Yes, sir; they are.

Q. Will you state to the Court what you observed with reference to the condition of the particular seat that you have referred to when you examined it at that time?

A. Well, I went down to this particular row of seats, and the second seat in from the aisle was empty at that time. The usherette had reported to me, and as I went down this seat was empty and it was down, and the left side of it, as I put my hand on it, would give just a fraction; I mean it would go up and down just a

(Testimony of James E. Corley.)

little bit. That is the general condition I saw, and I could tell, by putting my hand under it there, that it was broken. That is, the left side of the second seat from the aisle; the left arm or brace, whichever you want to term that.

Q. Was there any part of the seat other than that piece of metal which was broken or out of order? A. No, sir.

Q. And when you say 'that metal' in answer to the last question, you refer to these Defendants' Exhibits F, G, H and I?

A. Yes, sir."

(Rep. Tr. pg. 190, line 9 to pg. 192, line 20).

VANCE CUDD,

produced as a witness on behalf of defendants, testified as follows:

"Q. By Mr. Gallagher: Mr. Cudd, in the month of March, 1940, were you working as a janitor at the United Artists Theatre at 933 South Broadway in Los Angeles?

A. I was.

Q. For how long before that time had you worked at that theatre? [98]

A. Oh, three or four months, I would say.

Q. Did you work there during the entire month of March, 1940? A. Yes.

(Testimony of Vance Cudd.)

Q. In doing your work as a janitor there, will you state to the Court, what, if anything, you personally did with reference to the seats in the rows within the area being cleaned by you each day?

A. Well, we just came in direct contact with them to clean out between the seats and underneath the seats. We raised the seats up and left them up for the next day.

Q. Was your contact with the seats such as to cause your hand to come in contact with any part of the seat?

A. We raised the seats with our hands.

Q. In doing that could you tell if the seat was loose?

Mr. Rountree: We object to that on the ground it calls for a conclusion of the witness and is incompetent, irrelevant and immaterial.

Mr. Gallagher: I will withdraw the question and lay a better foundation, if I can.

Q. In your work in the theatre before March, 1940, had you had occasion to raise and lower many seats, or just a few?

A. Every seat in the house.

Q. And in the course of your work, did you become familiar with the seats themselves?

A. Oh, yes.

Q. And from your experience in handling those seats, could you tell, by raising or lowering one, whether the seat was or was not loose?

A. Well, we looked for things like that.

(Testimony of Vance Cudd.)

Q. Well, could you tell? A. Oh, yes."

(Rep. Tr. Pg. 193, line 9 to pg. 194, line 21).

[99]

Paragraphs I, II and III of the amended complaint relate solely and exclusively to the organization and existence of the defendants Fox West Coast Agency Corporation, a corporation, Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, the fact that said corporations were and each thereof was duly licensed to do business in the State of California and that the principal place of business of each was in the County of Los Angeles, State of California. There is no allegation in either paragraph I, or paragraph II, or paragraph III which alleges any actionable negligence or any negligence of any kind or character. The substance of each paragraph is merely the allegation of the name of each corporation, the fact that it was organized and existed pursuant to the laws of a State, other than the State of California, and that each ws duly licensed to do business in the State of California, and that each, except, the Fox West Coast Theatres Corporation, had its principal place of business in the County of Los Angeles, State of California.

Paragraph IV of the amended complaint relates exclusively to the defendant Fox West Coast Theatres Corporation, a corporation.

Omitting the title of court and cause, and the preliminary recitals which do not contain any finding of fact or conclusion of law, the

FINDINGS OF FACT

in the case at bar are as follows:

"The Court finds:

I.

That the allegations of Paragraphs I, II and III of plaintiff's amended complaint are true.

II.

That the allegations of Paragraph IV of plaintiff's amended complaint are not true.

III.

That it is true that defendants, Fox West Coast Agency [100] Corporation, a corporation, Fox West Coast Theatres Corporation and United Artists Theatre Circuit, Inc., a corporation, now and at all times mentioned in plaintiff's amended complaint, were engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said theater being located on South Broadway between 9th and 10th Streets in the City of Los Angeles, County of Los Angeles, State of California.

IV.

That it is true that on or about the 24th day of March, 1940, plaintiff paid an admission to the defendant corporations to enter the aforesaid United Artists Theater to view a motion picture then and there being displayed by said defendants and that said defendants accepted said admission fee from said plaintiff; that said plaintiff thereafter entered the said theater; it is further true that after entering the said theater the plaintiff proceeded to a seat among those provided for the patrons of said theater; that it is true that at said time and place, due to the careless and negligent manner in which the defendants, and each of them, and their said employees maintained and operated the seats in said theater, when the plaintiff sat down on a seat in said theater to view said picture show, as aforesaid, the said seat collapsed causing plaintiff to be thrown violently to the side and down, causing severe shock to her nervous system, a severe sprain and wrenching of her lower back, to her great pain and suffering, all to her damage in the sum of $1140.65.

V.

That it is true that the negligent and careless manner in which the said defendants and their employees and agents maintained and operated the seats in said theater was the immediate and proximate cause of the aforesaid injuries received by plaintiff. [101]

VI.

That it is true that as a result of said injuries sustained by plaintiff, as aforesaid, plaintiff was forced to incur doctors and physicians services in the reasonable sum of $709.50, nurses hire in the reasonable sum of $109.50; hospitalization in the reasonable sum of $99.89; a brace in the reasonable sum of $21.63 and drugs and medical supplies in the reasonable sum of $25.00, all to her damage in the sum of $965.52. That all of the aforesaid sums are the reasonable value of said items and were necessary to plaintiff to incur in the treatment of her said injuries.

VII.

That it is true that plaintiff at the time of said injury was employed and receiving compensation in the sum of $94.90 per month, and that by reason of the injuries aforesaid that plaintiff was compelled to and did remain away from her work for a period of four months and four days, all to her damage in the sum of $393.83.

VIII.

That all of the allegations set forth in the first affirmative defense of the defendant, Fox West Coast Theatres Corporation, are true.

IX.

That it is not true that on the 24th day of March, 1940, on the occasion of plaintiff enter-

ing the said United Artists Theater, as hereinbefore set out, that plaintiff negligently or carelessly failed to inspect or pay any attention to said seat or the condition thereof; it is further not true that the plaintiff negligently or carelessly failed to discover whether the same was or was not in a good and sufficient condition, or negligently or carelessly failed to ascertain or discover whether the same was or was not loose, or negligently or carelessly failed to make any test whatever of said seat; [102]

It is further not true that the plaintiff negligently or carelessly permitted her body to come in severe and unusual contact with the parts of said seat or negligently or carelessly caused the said seat to be subjected to an extraordinary or unusual strain and stress; It is further not true that plaintiff negligently or carelessly forced a portion of her body between the arms of said seat in a manner in which the said seat was not designed to be used or negligently or carelessly caused an extraordinary or unusual strain and stress on the arms of said seat to the sides thereof and away from each side of the plaintiff's body.

It is further not true that the plaintiff negligently or carelessly used the arms of said seat for a purpose for which they were not designed, or that plaintiff forced her body into the space existing between the arms of said seat, or that plaintiff exerted a great or unusual force sideways against each arm of said seat.

That it is true that plaintiff was a woman weighing approximately 285 pounds at the time of the said accident; that it is not true that plaintiff negligently or carelessly failed to take into consideration the fact that the seat was, and all of the seats in said theater, were designed to accommodate persons of average bulk and weight, nor is it true that the plaintiff negligently or carelessly failed to control her body, or forced her body into said seat;

That it is not true that the plaintiff spread, or strained, or misused the said seat;

That it is not true that the injuries sustained by plaintiff were the proximate result of any negligence or carelessness on her part whatsoever.

X.

That it is true, as hereinbefore found, that at the time of the said accident, plaintiff herein weighed approximately 285 pounds; that it is not true that the plaintiff knew or should have known [103] that seats in theaters or places of public accommodation are designed for the purpose of accommodating persons of normal size and normal or near normal weight; it is further not true that the plaintiff knew at all times that no seat in any theater was designed for the purpose of accommodating a person of grossly excessive weight, or a person of the size and weight of the plaintiff.

It is further not true that the plaintiff failed to use a certain seat in the United Artists

Theater in a manner commensurate with her weight and size, or that plaintiff by reason of her excessive weight and size tore said seat apart and broke the same.

It is further not true that plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for persons of the size and weight of plaintiff.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court concludes:

I.

That this action is barred by the provisions of subdivision 3 of Section 340 of the Code of Civil Procedure of the State of California as to the defendant, Fox West Coast Theatres Corporation, a corporation.

II.

That the United States District Court, Southern District of California, did not obtain or have jurisdiction of the defendant, Fox West Coast Theaters Corporation, a corporation, or of the subject matter of this action, insofar as the defendant, Fox West Coast Theaters Corporation, a corporation is concerned.

III.

That plaintiff should have and recover judgment in the total sum of $2500.00 against the

defendant, Fox West Coast Agency, a corporation, together with her costs of suit.

Let judgment be entered accordingly. [104]

Dated: March 12th, 1942.

J. F. T. O'CONNOR

Judge."

Omitting the title of court and cause and the preliminary recitals with reference to the filing of the written findings of fact and conclusions of law, the

JUDGMENT

appealed from is as follows:

"Now, Therefore, It Is Ordered. Adjudged and Decreed that plaintiff have and recover judgment against the defendant, Fox West Coast Agency, a corporation, in the sum of $2500.00 together with her costs of suit taxed at $87.63.

Done in open court this 12th day of March, 1942.

J. F. T. O'CONNOR

Judge."

Notice of entry of judgment in favor of plaintiff and against the defendant Fox West Coast Agency Corporation, a corporation, was served upon said defendant on the 24th day of March, 1942, said judgment having actually been entered on the 12th day of March, 1942.

Within the time allowed by law, the defendant

Fox West Coast Agency Corporation, a corporation, filed a motion for a new trial. Said motion for a new trial was orally presented and argued on the 20th day of April, 1942 and notice of ruling on said motion for a new trial, denying the same, was served upon the defendant Fox West Coast Agency Corporation, a corporation, on the 28th day of April, 1942.

The defendant Fox West Coast Agency Corporation, a corporation, within the time allowed by law filed a Notice of Appeal, and a copy of said Notice of Appeal was, within the time allowed by law, served upon counsel for the plaintiff, Jean L. Forsythe. A copy of [105] said Notice of Appeal is as follows:

"In the District Court of the United States
Southern District of California
Central Division

No. 1649 (BH) O'C

JEAN L. FORSYTHE,

Plaintiff,

vs.

FOX WEST COAST AGENCY CORPORATION, a corporation, et al.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Fox West Coast Agency Corporation, a corporation, hereby appeals to the United States Circuit Court of Ap-

peals for the Ninth Circuit, from the final judgment entered in this action on the 12th day of March, 1942.

Dated: May 20th, 1942.

LASHER B. GALLAGHER
Attorney for Appellant Fox West Coast Agency Corporation, a corporation.
Address: 458 South Spring St., Los Angeles, California."

The foregoing Notice of Appeal was filed on the 20th day of May, 1942. [106]

THE STATEMENT OF THE POINTS RELIED ON BY APPELLANT

is as follows:

I.

There is no evidence showing that there was any relationship between the plaintiff and the defendant Fox West Coast Agency Corporation, a corporation, excepting that they were strangers to each other and occupied that relationship which one member of the public bears to another member of the public.

II.

There is no evidence supporting the finding that the plaintiff was an invitee of the defendant Fox West Coast Agency Corporation, a corporation.

III.

There is no evidence showing that the Fox West Coast Agency Corporation, a corporation, violated

or breached any duty which it owed to the plaintiff Jean L. Forsythe.

IV.

There is no evidence showing any actionable negligence on the part of the defendant Fox West Coast Agency Corporation, a corporation.

V.

The Court erred in failing to find that the plaintiff did not sustain any injury as a proximate result of any breach of duty or negligence on the part of the defendant Fox West Coast Agency Corporation, a corporation.

VI.

There is no evidence showing that any servant, agent or employee of the defendant Fox West Coast Agency Corporation, a corporation, was guilty of any negligence whatever or did any act or omitted the doing of any act which proximately or at all caused or contributed to any injuries sustained by the plaintiff. [107]

VII.

The trial Court erred in failing to find that the plaintiff was guilty of negligence which was a proximate cause of her injuries.

VIII.

The trial Court erred in failing to find that the plaintiff assumed the risk of injury.

IX.

The conclusion of law that plaintiff should have and recover judgment in the sum of $2500 against

the defendant Fox West Coast Agency Corporation, a corporation, together with her costs of suit is not supported or sustained by the findings with reference to the first affirmative and second affirmative defenses of the defendant Fox West Coast Agency Corporation, a corporation, in that said findings are in the form of negatives pregnant, are conflicting and contradictory, and actually are favorable to the appellant Fox West Coast Agency Corporation, a corporation, and on the facts actually found, in favor of the allegations of the said special defenses and each of them, the trial Court should have concluded that the plaintiff was not entitled to recover any sum whatsoever and that the defendant Fox West Coast Agency Corporation, a corporation, was entitled to judgment for its costs of suit.

X.

The Court erred in admitting in evidence, pursuant to plaintiff's offer thereof, the complaint of plaintiff and the answer of Fox West Coast Agency Corporation, a corporation, in a prior action filed in the Superior Court of the State of California, in and for the County of Los Angeles.

XI.

The Court erred in admitting in evidence conversations between one of plaintiff's witnesses and an officer of appellant, there being no evidence proving or tending to prove that any of such conversation was part of the res gestae or within the course or [108] scope of the agency of the said witness.

XII.

The Court erred in admitting in evidence the opinions and conclusions of the witness John B. Bertero.

XIII.

The Court erred in admitting in evidence a contract to which plaintiff was not a party.

It Is Stipulated that the foregoing Statement of the Case conforms to the truth and contains all parts of the record necessary fully to present the questions raised by the appeal and that the same may be approved by the above entitled Court and shall then be certified to the appellate court as the Record on Appeal. By this stipulation, the plaintiff is not agreeing or conceding that any point to be relied on by the appellant on this appeal as stated hereinabove, is correct, but, excluding the Statement of the Points to be relied upon by the appellant, the foregoing Statement of the Case conforms to the truth.

Dated: June 2nd, 1942.

ROSECRANS & EMME and
BAYARD R. ROUNTREE
By BAYARD R. ROUNTREE
Attorneys for Plaintiff,
Jean L. Forsythe.

LASHER B. GALLAGHER
Attorney for Appellant, Fox West Coast Agency Corporation, a Corporation.

The foregoing Statement of the Case conforms to the truth and is hereby approved and It Is Ordered that the foregoing Statement of the Case be certified to the appellate court as the Record on Appeal in the above entitled action.

Done in open Court this 3 day of June, 1942.

J. F. T. O'CONNOR
United States District Judge.

[109]

Received copy of the within Statement of the Case, etc., this 25th day of May, 1942.

ROSECRANS & EMME
E. M. F.
Attorneys for Plaintiff.

[Endorsed]: Filed June 3, 1942. [109a]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Occidental Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California, is held and firmly bound unto Jean L. Forsythe, in the above entitled suit in the penal sum of Thirty Five Hundred and No/100 Dollars ($3500.00), to be paid to the said Jean L. Forsythe, her successors and as-

signs, which payment well and truly to be made the Occidental Indemnity Company, a corporation, binds itself, its successors and assigns, firmly by these presents.

Sealed with the corporate seal and dated this 19th day of May, 1942.

The condition of the above application is such that: [110]

Whereas, Fox West Coast Agency Corporation, a corporation, only, one of the defendants in the above entitled suit has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment in the sum of $2500 and costs in the sum of $87.63 entered on the 12th day of March, 1942, by the District Court of the United States, Southern District of California, Central Division, in the above entitled cause;

Now, Therefore, the condition of this bond is for the satisfaction of the judgment in full against Fox West Coast Agency Corporation, a corporation, only, together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of judgment and such costs, interest and damages as the appellate court may adjudge and award against Fox West Coast Agency Corporation, a corporation.

In Witness Whereof, the corporate seal of said surety is hereby affixed and attested to by its duly

authorized attorney-in-fact at Los Angeles, California, this 20th day of May, 1942.

(Seal) OCCIDENTAL INDEMNITY COMPANY

By L. H. SCHWOBEDA
Attorney-in-Fact.

State of California
County of Los Angeles—ss:

On this 20th day of May, 1942, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. H. Schwobeda, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Occidental Indemnity Company and acknowledged to me that he subscribed the name of Occidental Indemnity Company thereto as principal, and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

(Seal) M. E. BEETH
Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 23, 1945.

Examined and recommended for approval as provided in Rule 13.

LASHER B. GALLAGHER
Attorney for defendant Fox West Coast Agency Corporation, a corporation.

I hereby approve the foregoing bond this 20 day of May, 1942.

J. F. T. O'CONNOR
United States District Judge.

[Endorsed]: Filed May 20, 1942. [111]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111, inclusive, contain the original statement of the case pursuant to Rule 76 of the Rules of Civil Procedure and a full, true and correct copy of supersedeas bond on appeal, which together with the original defendant's exhibits C and D and Reporter's Transcript transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing

record amount to $18.50, which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 17th day of June, A. D. 1942.

(Seal) EDMUND L. SMITH,
Clerk
By THEODORE HOCKE,
Deputy

[Endorsed]: No. 10169. United States Circuit Court of Appeals for the Ninth Circuit. Fox West Coast Agency Corporation, a corporation, Appellant, vs. Jean L. Forsythe, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 18, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10169

FOX WEST COAST AGENCY CORPORATION,
a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

I.

There is no evidence showing that there was any relationship between the appellee and the appellant Fox West Coast Agency Corporation, a corporation, excepting that they were strangers to each other and occupied that relationship which one member of the public bears to another member of the public.

II.

There is no evidence supporting the finding that the appellee was an invitee of the appellant Fox West Coast Agency Corporation, a corporation.

III.

There is no evidence showing that the Fox West Coast Agency Corporation, a corporation, violated or breached any duty which it owed to the appellee Jean L. Forsythe.

IV.

There is no evidence showing any actionable negligence on the part of the appellant Fox West Coast Agency Corporation, a corporation.

V.

The Court erred in failing to find that the appellee did not sustain any injury as a proximate result of any breach of duty or negligence on the part of the appellant Fox West Coast Agency Corporation, a corporation.

VI.

There is no evidence showing that any servant, agent or employee of the appellant Fox West Coast Agency Corporation, a corporation, was guilty of any negligence whatever or did any act or omitted the doing of any act which proximately or at all caused or contributed to any injuries sustained by the appellee.

VII.

The trial Court erred in failing to find that the appellee was guilty of negligence which was a proximate cause of her injuries.

VIII.

The trial Court erred in failing to find that the appellee assumed the risk of injury.

IX.

The conclusion of law that appellee should have and recover judgment in the sum of $2500 against

the appellant Fox West Coast Agency Corporation, a corporation, together with her costs of suit is not supported or sustained by the findings with reference to the first affirmative and second affirmative defenses of the appellant Fox West Coast Agency Corporation, a corporation, in that said findings are in the form of negatives pregnant, are conflicting and contradictory, and actually are favorable to the appellant Fox West Coast Agency Corporation, a corporation, and on the facts actually found, in favor of the allegations of the said special defenses and each of them, the trial Court should have concluded that the appellee was not entitled to recover any sum whatsoever and that the appellant Fox West Coast Agency Corporation, a corporation, was entitled to judgment for its costs of suit.

X.

The Court erred in admitting in evidence, pursuant to appellee's offer thereof, the complaint of appellee and the answer of Fox West Coast Agency Corporation, a corporation, in a prior action filed in the Superior Court of the State of California, in and for the Company of Los Angeles.

XI.

The Court erred in admitting in evidence conversations between one of appellee's witnesses and an officer of appellant, there being no evidence proving or tending to prove that any of such conversation was part of the res gestae or within the course or scope of the agency of the said witness.

XII.

The Court erred in admitting in evidence the opinions and conclusions of the witness John B. Bertero.

XIII.

The Court erred in admitting in evidence a contract to which appellee was not a party.

Dated: Los Angeles, California, this 13th day of June, 1942.

LASHER B. GALLAGHER
Attorney for Appellant, Fox West Coast Agency Corporation, a corporation.

Received copy of the within Statement of Points etc. this 15th day of June, 1942.

ROSECRANS & EMME
By J P M
Attorneys for Appellee.

[Endorsed]: Filed June 13, 1942. Paul P. O'Brien, Clerk.

No. 10169

United States
Circuit Court of Appeals

For the Ninth Circuit.

FOX WEST COAST AGENCY CORPORATION,
a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

No. 10169

United States
Circuit Court of Appeals
For the Ninth Circuit.

FOX WEST COAST AGENCY CORPORATION,
a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10169

FOX WEST COAST AGENCY CORPORATION,
Appellant,

vs.

JEAN L. FORSYTHE,
Appellee.

ORDER

This appeal is from a judgment of the District Court of the United States for the Southern District of California in an action by appellee against appellant and five other defendants. The action was brought in the Superior Court of Los Angeles County, but, on petition of appellant, was thence removed to the District Court. The record on appeal consists of an agreed statement prepared, signed and certified pursuant to Rule 76 of the Federal Rules of Civil Procedure. It includes appellee's amended complaint (filed in the District Court), but does not include the original complaint, the summons, the return (if any) showing service of summons, the petition for removal or the bond on removal. Thus the record fail*u*s to show that the case was removable, that it was properly removed or that the District Court had jurisdiction thereof. Therefore, it is hereby ordered as follows:

Appellant and appellee are given ten days within which they, or either of them, may procure and cause to be certified and transmitted by the clerk of

the District Court to the clerk of this court a supplemental record, as provided in Rule 75 (h) of the Federal Rules of Civil Procedure, such supplemental record to include the original complaint, the summons, the return (if any) showing service of summons, the petition for removal and the bond on removal. If this be not done within ten days from this date, the judgment will be reversed, and the case will be remanded to the District Court with directions to remand it to the Superior Court.

Dated October 15, 1942.

WILLIAM DENMAN
CLIFTON MATHEWS
ALBERT LEE STEPHENS
United States Circuit
Judges.

[Endorsed]: Order, etc. Filed Oct. 15, 1942. Paul P. O'Brien, Clerk.

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:
LASHER B. GALLAGHER, Esq.
458 S. Spring St.
Los Angeles, Calif.

For Appellee:
ROSECRANS & EMME and
BAYARD R. ROUNTREE, Esqs.
515 Black Bldg.
Los Angeles, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
In and for the County of Los Angeles

459395

JEAN L. FORSYTHE,

Plaintiff,

vs.

FOX WEST COAST AGENCY CORPORATION, a corporation, John Doe Company, a corporation, Richard Roe Ltd., a corporation, John Doe, Richard Roe and Jane Doe,

Defendants.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES

Comes Now the plaintiff and for cause of action against the above named defendants, and each of them, alleges:

I.

That during all the times herein mentioned the defendant, Fox West Coast Agency Corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly licensed to do business in the State of California, with its principal place of business in the County of Los Angeles, State of California.

II.

That the defendants, John Doe Company, a corporation, Richard Roe Ltd., a corporation, John

Doe, Richard Roe, and Jane Doe are sued herein under fictitious names as their true names are unknown to plaintiff herein, and plaintiff asks permission upon ascertaining the true names of said defendants to insert their true names in lieu of said fictitious names.

III.

That durng all the times herein mentioned the defendants John Doe Company and Richard Roe, Ltd. have been and now are corporations organized and existing under the laws of the State of California, with their principal place of business in the County of Los Angeles, State of California. [2]

IV.

That the defendants, Fox West Coast Agency Corporation John Doe Company, and Richard Roe, Ltd. now and at all times mentioned herein are engaged in the business of operating and maintaining a motion picture theater known as the United Artists Treater which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said theater being located on South Broadway between Ninth and Tenth Streets in the City of Los Angeles, County of Los Angeles, State of California, and that the defendants John Doe, Richard Roe and Jane Doe are employees and agents of said defendants, Fox West Coast Agency Corporation, John Doe Company and Richard Roe Ltd. employed in said business of operating and maintaining the said United Artists Theater.

V.

That on or about the 24th day of March, 1940, plaintiff paid an admission to the defendants to enter the aforesaid United Artists Theater to view the motion pic*u*res and entertainment then and there being displayed by said defendants and that said defendants accepted said admission fee from said plaintiff and said plaintiff thereafter entered said theater; that after entering said theater plaintiff proceeded to a seat among those provided for the patrons of said theater. That at said time and place, due to the careless and negligent manner in which the defendants, and each of them, and their said employees maintained and operated the seats in the said theater when the plaintiff sat down upon said seat in said theater to view said picture show as aforesaid, the said seat collapsed causing her to be thrown violently to the side and down, thereby causing severe shock to her nervous system, bruises, abrasions, contusions and a severe sprain and wrenching of her lower back, all to her great pain and suffering; that it made her sick and sore and unable to attend to her business, and that as a result thereof plaintiff still suffers great [3] pain, and plaintiff is informed and believes that the above named injuries are permanent, all to her damage in the sum of Twenty Thousand Dollars ($20,000.00).

VI.

That the negligent and careless manner in which the defendants and their said employees and agents maintained and operated the seats in said theater

was the immediate and proximate cause of the aforesaid injuries received by the plaintiff.

VII.

That as a result of said injuries sustained by plaintiff as aforesaid, plaintiff was forced to incur doctors and physicians services in the reasonable sum of $426.50, nurses hire in the reasonable sum of $214.50, hospitalization in the reasonable sum of $161.24, ambulance hire in the reasonable sum of $10.00, brace in the reasonable sum of $44.50, drugs and medical supplies in the reasonable value of $158.83, all to her damage in the sum of $1,015.57. That all of the aforesaid sums are the reasonable value of said services and were necessary for plaintiff to incur in the treating of her said injuries. That plaintiff will be forced to incur further services for the treatment of said injuries and will ask leave of court to amend this complaint to include said further expenses.

VIII.

The plaintiff at the time of said injury was employed and receiving compensation in the sum of $94.90 per month, and that by reason of the injuries aforesaid, plaintiff was compelled to and did remain away from her work for a period of four months and four days, all to her damage in the sum of $390.84.

Wherefore Plaintiff prays judgment against the defendants, and each of them in the sum of Twenty Thousand Dollars ($20,000.00) general damages; for

the sum of $1406.41 special damages, and for a further sum as special damages to be ascertained at the time of trial, together with her costs of suit [4] herein incurred, and for such other and further relief as to this court may seem meet and just.

ROSECRANS & EMME
By LEO M. ROSECRANS
Attorneys for Plaintiff.

State of California
County of Los Angeles—ss.

Jean L. Forsythe being by me first duly sworn, deposes and says: that she is the Plaintiff in the above entitled action; that she has read the foregoing Complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that *he* believes it to be true.

JEAN L. FORSYTHE

Subscribed and sworn to before me this 19 day of December, 1940.

[Seal] MARY LYNCH
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 459395. Complaint for Damages for Personal Injuries. Filed Dec. 20, 1940. L. E. Lampton, County Clerk. By C. H. Holdredge, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. E. Zimmerman, Clerk. [5]

[Title of Superior Court and Cause.]

DEMURRER AND MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT THOMAS SORIERO.

The defendant Thomas Soriero (sued herein as John Doe) demurs to plaintiff's complaint as follows:

I.

Said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

Said complaint is uncertain in that it cannot be ascertained therefrom what, if any negligent act is meant to be charged by the language "that at said time and place, due to the careless and negligent manner in which the defendants, and each of them, and their said employees maintained and operated the seats in the said theatre when the plaintiff sat down upon said seat in said threatre to view said picture *so* as aforesaid, the said seat collapsed."

III.

Said complaint is uncertain in that it cannot be ascertained therefrom what negligent act is meant to be charged in paragraph V by the allegation that due to the careless and negligent manner in which the defendants maintained the seats in said theatre the seat collapsed, or what of the many acts and things which may be included within the

meaning of the verb "maintained" is meant to be charged as a negligent or careless act.

IV.

Said complaint is uncertain in that it cannot be ascertained therefrom what the plaintiff means to allege or charge in [6] paragraph V by the allegation that due to the careless and negligent manner in which the defendants and their employees operated the seats in the theatre a certain seat collapsed for the reason that a seat is not ordinarily operated and what the plaintiff means by the use of the verb "operated" cannot be discovered from any allegation in the complaint.

V.

The allegations of paragraph VI are uncertain in that it cannot be ascertained therefrom what negligent or careless act is meant to be charged against this defendant with reference to the maintenance of any seat in the theatre or with reference to operation of any seat in the theatre or how the defendant could have operated any seat in said theatre.

Wherefore defendant prays that his demurrer be sustained and that he recover his costs incurred herein.

LOWELL L. DRYDEN
Attorney for defendant
Thomas Soriero.

I hereby certify that the foregoing demurrer is not interposed for the purpose of delay and is, in my opinion, well taken in point of law.

LOWELL L. DRYDEN [7]

MEMORANDUM OF POINTS AND AUTHORITIES

The defendant Thomas Soriero was sued herein as John Doe (see summons showing that the complaint was served on this defendant as John Doe). The allegation in paragraph IV is that the defendant John Doe is an employee and agent of the defendants Fox West Coast Agency Corporation, John Doe Company and Richard Roe Ltd. The complaint alleges that the corporate defendants are engaged in the business of operating and maintaining a motion picture theatre. It is quite obvious from these allegations that this defendant is not charged with maintaining or operating the theatre or with any status which would make him an invitor of the plaintiff. The complaint does not state facts sufficient to constitute a cause of action against this defendant individually because it does not show any facts from which it would appear that this defendant invited the plaintiff to enter the theatre or that the plaintiff was an invitee of this defendant. This defendant may, as an employee of the corporate defendants, have agreed to inspect the equipment of the theatre and he may have failed in his obligation but his failure does not give the plaintiff any right of action because the obligation which this defendant would thus have failed to perform was an obligation placed upon him solely by a contract between this defendant and the owner of the theatre and was not a duty which this defendant owed to the general public or to the plaintiff

or to any other invitee. In other words, he may have failed in his contractual obligation to the owner of the theatre but this would not make him individually liable to an invitee of the owner of the theatre. In support of this proposition defendant relies on the case of Strattons Independence Ltd. v. Sterrett, 117 p. 351.

In support of the special demurrer, defendant calls the attention of the court to the following cases:

Newell v. Woodward, 270 N. Y. S. 258

Shanley v. American Olive Co. 185 Cal. 552, 197 P. 793. [8]

Mautino v. Sutter Hospital Assn. 211 Cal. 556, 296, P. 76

Blodgett v. B. H. Dyas Co., 4 Cal. (2d) 511, 50 P. (2d) 801

Warnke v. Griffith Co. 133 Cal. App. 481, 24 P. (2d) 583

Crawford v. Pac. States Sav. etc. 22 Cal. App. (2d) 448, 71 P. (2d) 333

Reinhard v. Lawrence Warehouse Co. 107 P. (2d) 501

It is respectfully submitted that the demurrer should be sustained.

LOWELL L. DRYDEN
Attorney for defendant
Thomas Soriero

[Affidavit of Service by Mail * * *]

* * * * *

[Endorsed]: Filed Jan. 6, 1941. L. E. Lampton, County Clerk. By C. H. Holdredge, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [9]

In the Superior Court of the State of California
In and for the County of Los Angeles
January 10, 1941

Present Hon. Frank G. Swain Judge Presiding

No. 459395

Department No. 35

[Title of Cause.]

Demurrer of Defendant Fox West Coast Agency Corporation to complaint and Demurrer of Defendant Thomas Soriero to complaint come on for hearing; Rosecrans & Emme by L. M. Rosecrans appearing as attorneys for the plaintiff and Lasher B. Gallagher and L. Dryden for defendants demurring. Demurrer of defendant Fox West Coast Agency Corporation to complaint is overruled; defendant named is given 10 days to answer. Demurrer of defendant Thomas Soriero to complaint is sustained; plaintiff is given 10 days to amend.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [10]

[Title of Superior Court and Cause.]

PARTIAL DISMISSAL

To the Clerk of Said Court:

You will enter the dismissal of the above entitled action. Only as to the defendant Thomas Soriero, sued herein as John Doe Los Angeles, Cal., January 14, 1941.

ROSECRANS & EMME
By LEO M. ROSECRANS
Attorney for Plaintiff.

Note: Where affirmative relief is sought in Answer or Cross-complaint, Dismissal must also be signed by the attorney for the defendant.

[Endorsed]: Filed Jan. 15, 1941. L. E. Hampton, County Clerk. By M. F. Gift, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [11]

[Title of Superior Court and Cause.]

ANSWER OF DEFENDANT FOX WEST COAST AGENCY CORPORATION, a corporation

Comes now the defendant Fox West Coast Agency Corporation, a corporation, and answers the complaint of plaintiff on file herein, as follows:

I.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allega-

tions, or any thereof, contained in paragraphs II, III, VII and VIII of said complaint and placing its denial thereof upon said ground, denies said allegations and each thereof.

II.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations in paragraph IV that "the defendants John Doe, Richard Roe and Jane Doe are employees and agents of said defendants, Fox West Coast Agency Corporation, John Doe Company and Richard Roe Ltd. employed in said business of operating and maintaining the said United Artists Theater," and placing its denial thereof upon said ground, denies said allegations and each thereof.

III.

The balance of the allegations in paragraph IV are, and each thereof is, denied.

IV.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations in paragraph V from and including the words "That on or about the 24th day of [12] March, 1940," line 25, page 2, to and including the words "provided for the patrons of said theater", line 32, page 2 of said complaint, and placing its denial thereof upon said ground, denies said allegations and each thereof.

Defendant denies each and every allegation con-

tained in said paragraph V from and including the Words "That at said time", line 32, page 2 to and including the figures "($20,000.00)," line 14, page 3 of said complaint.

V.

Defendant denies the allegations and each thereof contained in paragraph VI of said complaint.

VI.

This defendant denies that the plaintiff has been damaged in any sum whatsoever or at all or that plaintiff was injured by reason of any act or omission of this defendant.

* * * * * * *

As and for a First, Separate and Special Defense, defendant alleges that on or about the 24th day of March, 1940, the plaintiff so negligently, carelessly and recklessly conducted herself while in the United Artists Theatre in the City of Los Angeles, California, immediately prior to and at the time she seated herself in a certain seat in said theatre, that any injury or damage sustained by plaintiff was a proximate result of said negligence, carelessness and recklessness on her part.

As and for a Second, Separate and Special Defense, defendant is informed and believes, and therefore, alleges that the plaintiff, at all times mentioned in her complaint, was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew, or

should have known, that seats in theatres and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal [13] and near normal weight and the plaintiff knew, at all times, that no seat in any theatre was designed for the purpose of accommodating a person of the grossly excessive weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in defendant's theatre in a manner commersurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff.

Wherefore, defendant prays that plaintiff take nothing by her said complaint and that defendant have judgment for its costs incurred and to be incurred herein.

LASHER B. GALLAGHER
Attorney for defendant Fox West Coast Agency Corporation, a corporation. [14]

State of California
County of Los Angeles—ss.

John B. Bertero being by me first duly sworn, deposes and says: that he is the Assistant-Secretary

of Fox*t* West Coast Agency Corporation, a corporation, in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN B. BERTERO

Subscribed and sworn to before me this 17th day of January, 1941.

[Seal] ANN FRIEDLUND

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires January 12, 1944.

[Endorsed]: Received copy of the within this 18 day of Jan., 1941. Rosecrans & Emme *G* Attorneys for Pltff.

[Endorsed]: Filed Jan. 20. L. E. Lampton, County Clerk. By B. B. Burrus, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [15]

[Title of Superior Court and Cause.]

NOTICE OF TRIAL

To the Defendant, Fox West Coast Agency Corporation, a corporation, and to its attorney, Lasher B. Gallagher:

You, and Each of You, Will Please Take Notice that the above entitled case is set for trial in the Department of the Presiding Judge, Room 806,

Hall of Records, on the 18th day of June, 1941, at the hour of 9:30 o'clock a. m. or as soon thereafter as counsel can be heard.

Dated: April 25, 1941.

ROSECRANS & EMME
By OTTO J. EMME
Attorney for Plaintiff.

[Endorsed]: No. 459395. Notice of Trial. Received copy of the within Notice of trial this 29 day of April, 1941. Lasher B. Gallagher. By D. Meyer, Attorney for defendant.

[Endorsed]: Filed Apr. 29, 1941. L. E. Lampton, County Clerk. By B. B. Burrus, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [16]

[Title of Superior Court and Cause.]

NOTICE OF FILING PETITION AND BOND FOR REMOVAL TO DISTRICT COURT OF THE UNITED STATES

To the plaintiff in the above entitled action and to her attorneys Messrs. Rosecrans & Emme:

You and Each of You Will Please Take Notice, and you are hereby notified that the defendant Fox West Coast Agency Corporation, a corporation, will, on Wednesday, June 18th, 1941, at the hour of 10 A. M. of said day, or as soon thereafter as counsel can be heard in Department 13 of the above entitled court, present to the above entitled court

said defendant's petition and bond for removal of said cause from the said Superior Court of the State of California, in and for the County of Los Angeles, to the District Court of the United States, Southern District of California, Central Division.

Said petition and motion will be filed and made upon the ground that there is a diversity of citizenship between the plaintiff and the said defendant and petitioner Fox West Coast Agency Corporation, a corporation, and that the plaintiff has signified her intention to proceed against the defendant and petitioner Fox West Coast Agency Corporation, a corporation, solely, said defendant and petitioner being a citizen of the State of Delaware, and upon the further ground that the amount in controversy is the sum of $21,406.41, exclusive of interest and costs, lawful money of the United States, and said petition and motion will be based upon the complaint, this notice, the petition for removal, the bond for removal and all the records [17] and files of this action, true copies of which notice, petition and bond, are herewith served upon you.

Dated: June 18th, 1941.

LASHER B. GALLAGHER
Attorney for defendant and petitioner, Fox West Coast Agency Corporation, a corporation.

[Endorsed]: Filed Jun. 18, 1941. L. E. Lampton, County Clerk. By T. C. Hutton, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [18]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO FEDERAL COURT

Comes now the defendant Fox West Coast Agency Corporation, a corporation, and files this its petition for removal of this cause from the above entitled Superior Court, in which it is now pending, to the District Court of the United States, Southern District of California, Central Division, held at the City of Los Angeles, in the said District and State, and in this behalf, your petitioner respectfully shows:

I

That this action was commenced in the above entitled court by the filing of a complaint on the 20th day of December, 1940, that in said complaint the plaintiff alleges under oath, "that during all the times herein mentioned, the defendants John Doe Company and Richard Roe, Ltd. have been and now are corporations organized and existing under the laws of the State of California, with their principal place of business in the County of Los Angeles, State of California" and the plaintiff also alleges, "that the defendants, Fox West Coast Agency Corporation, John Doe Company, and Richard Roe, Ltd. now and at all times mentioned herein are engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said

theater being located on South Broadway between Ninth and Tenth Streets in the City of Los Angeles, County of Los Angeles, [19] State of California", and whereas, in said complaint, the plaintiff alleges that she was an invitee of all of said defendants, to wit, your petitioner and John Doe Company and Richard Roe Ltd., the latter two being alleged to have been organized and existing under the laws of the State of California, and, whereas, no process of any kind has been served insofar as the defendants John Doe Company and Richard Roe Ltd. are concerned, but the plaintiff has announced her intention to ignore the defendants who are residents of the State of California and to proceed solely against your petitioner, the said petitioner hereby objects to said procedure and demands that this action be forthwith removed to the United States District Court, hereinabove referred to.

II

This is a civil action at law of which the District Courts of the United States have original jurisdiction; it is an action for the recovery of $21,406.41, exclusive of interest and costs, lawful money of the United States; no special bail was or is required.

III

Your petitioner alleges that the cause of action against this petitioner is upon an alleged tort in that the plaintiff alleges that she was an invitee of petitioner and that by reason of alleged negligence on the part of petitioner, the plaintiff was injured.

Petitioner alleges that at all times mentioned in the plaintiff's complaint it has been and now is a corporation, organized and existing pursuant to the laws of the State of Delaware and that the plaintiff herein is a resident and citizen of the State of California.

IV

The plaintiff has fraudulently joined as defendants in said complaint, the other defendants alleged to be residents of the State of California, for the purpose of attempting to prevent petitioner from removing this case to the United States District [20] Court.

V

Petitioner files herewith a good and sufficient bond in the sum of $500.00 as required by the acts of Congress on that behalf made and provided for entry in the District Court of the United States, Southern District of California, Central Division, within thirty days from the filing of this petition, of a certified copy of the records in this action and for paying all costs that may be awarded by said District Court if it shall hold that such action was wrongfully or improperly removed thereto.

Petitioner therefore prays, that this Honorable Court proceed no further herein, except to accept the bond herewith presented and order the removal of this action to the District Court of the United States, Southern District of California, Central Division, in which District the above action is pend-

ing and direct that a transcript of the record be made and certified as provided by law.

Dated: June 18th, 1941.

FOX WEST COAST AGENCY CORPORATION,
a corporation,
By JOHN B. BERTERO,
Assistant Secretary-Petitioner.
LASHER B. GALLAGHER,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

John B. Bertero, being by me first duly sworn, deposes and says: that he is the Assistant Secretary of Fox West Coast Agency Corporation, a corporation, and as such officer makes this verification for and on behalf of said corporation, in the above entitled action; that he has read the foregoing Petition for Removal to Federal Court and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, [21] and as to those matters that he believes it to be true.

JOHN B. BERTERO.

Subscribed and sworn to before me this 18th day of June, 1941.

[Seal] ENES SARVELLO,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jun. 18, 1941. L. E. Lampton, County Clerk. By T. C. Hutton, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [22]

[Title of Superior Court and Cause.]

BOND ON REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Know All Men By These Presents:

That we, Fox West Coast Agency Corporation, a Corporation, as Principal, and Occidental Indemnity Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, as surety, are held and firmly bound unto Jean L. Forsythe, Plaintiff, in the above entitled suit, in the sum of Five Hundred and No/100 Dollars ($500.00) lawful money of the United States of America, for the payment of which said sum well and truly to be made, we, and each of us, bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The conditions of this obligation are such that, Whereas, said Fox West Coast Agency Corporation, a Corporation, has applied, or is about to apply, by a petition to the above entitled court, for the removal of a certain suit pending therein, wherein Jean L. Forsythe is Plaintiff and said Fox West

Coast Agency Corporation, a Corporation, is Defendant, to the District Court of the United States for the Southern District of California, Central Division, said District Court being the District Court to be held in the district in which such suit is pending, and for staying of further proceedings in said suit from the above entitled court upon the grounds in said petition set forth; Now, Therefore, if Fox West Coast Agency Corporation, a Corporation, shall enter in said District Court of the United States for the Southern District of California, Central Division, within [23] thirty (30) days from the date of filing said petition, a certified copy of the record in the above entitled suit and shall pay all costs that they may be awarded by the said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

Dated June 18th, 1941.

FOX WEST COAST AGENCY CORPORATION,

[Seal] By JOHN B. BERTERO,
Asst. Secy., Principal.

OCCIDENTAL INDEMNITY COMPANY,

[Seal] By L. H. SCHWOBEDA,
Attorney in Fact.

State of California,
County of Los Angeles—ss.

On this 18th day of June, 1941, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. H. Schwobeda known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Occidental Indemnity Company and acknowledged to me that he subscribed the name of Occidental Indemnity Company thereto as principal, and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

[Seal] M. E. BEETH,
Notary Public in and for the County of Los Angeles, State of California.
My commission expires March 23, 1945. [24]

The within Bond is hereby approved this 18th day of June, 1941.

PARKER WOOD,
Judge of the Superior Court of the State of California, in and for the County of Los Angeles.

[Endorsed]: Filed Jun. 18, 1941. L. E. Lampton, County Clerk. By T. C. Hutton, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [25]

In the Superior Court of the State of California
in and for the County of Los Angeles

June 18, 1941

Present Hon. Parker Wood, Judge Presiding
No. 459395
Department No. 13

[Title of Cause.]

Cause transferred from department one, is called for trial; Rosecrans and Emme appear as counsel for the plaintiff and Lasher B. Gallagher appears as counsel for the defendant. Gene C. Campbell, reporter, is present from 10:00 A. M. to 4:00 P. M. The petition of defendant for removal to the Federal Court is granted and the cause is ordered removed to the United States District Court, Southern District of California, Central Division. Bond on removal is approved and proceedings herein are ordered suspended.

[Endorsed]: Filed Jul. 14, 1941. [26]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

Upon reading and filing the petition of the defendant Fox West Coast Agency Corporation, a corporation, for removal of the above entitled action to the District Court of the United States, Southern

District of California, Central Division, and upon an examination of the bond also filed and presented herewith, and good cause appearing therefor;

It Is Hereby Ordered that the bond presented and filed with petitioner's petition for removal is hereby approved.

It Is Further Ordered that the above entitled action be, and it is hereby transferred and removed to the said District Court of the United States, Southern District of California, Central Division, and it is further ordered that the clerk of the above entitled court prepare a certified copy of the record in the above entitled action and transmit the same to the clerk of the said District Court of the United States, Southern District of California, Central Division.

Done in open court this 18th day of June, 1941.

PARKER WOOD,
Judge of the Superior Court.

[Endorsed]: Filed Jun. 18, 1941. L. E. Lampton, County Clerk. By T. C. Hutton, Deputy.

[Endorsed]: Filed Jul. 14, 1941. R. S. Zimmerman, Clerk. [27]

No. 459395

State of California
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of Complaint, Demurrer of Fox West Coast Agency Corporation including Memorandum of Points and Authorities, Demurrer of Thomas Soriero including Memorandum of Points and Authorities, Minute Order of January 10, 1941 in re demurrers, Partial Dismissal, Notice of Ruling on Demurrer, Memorandum of Costs and Disbursements, Answer of Fox West Coast Agency Corporation, Memorandum for setting for trial, Minute Order of April 22, 1941, Notice of Trial, Affidavit for Issuance of Subpoena to take Deposition, Notice of taking deposition, Affidavit for and Order shortening time of service of notice of taking deposition, Affidavits for Subpoena Duces Tecum (4), Minute Order transferring cause to Department 13, Notice of Filing and Hearing petition for removal, Petition for Removal, Bond on Removal, Minute Order granting petition for removal, and written Order for Removal to the District Court of the United States for the Southern District of California (Central Division), in the action of Jean L. Forsythe vs. Fox West Coast Agency Corporation, a corporation, et al., to be full, true and correct copies of

all of the original documents on file and/or of record in this office in said action, to date.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 12th day of July, 1941.

L. E. LAMPTON,
County Clerk and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

[Seal] By M. B. WARD
Deputy

[Endorsed]: Filed Jul. 14, 1941. [28]

[Title of Superior Court and Cause.]

ACTION BROUGHT IN THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, AND COMPLAINT FILED IN THE OFFICE OF THE CLERK OF THE SUPERIOR COURT OF SAID COUNTY

Summons

The People of the State of California Send Greetings to:

Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe Ltd., a corporation, John Doe, Richard Roe and Jane Doe, Defendant.

You are directed to appear in an action brought against you by the above named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 20 day of December, 1940.

[Seal Superior Court Los Angeles County]

L. E. LAMPTON,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By C. H. HOLDREDGE
Deputy [29]

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an

attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

State of California,
County of Los Angeles—ss.

Affidavit of Service
459395

The undersigned being sworn, says: I am and was at the time of the service of the summons herein, over the age of eighteen years, and not a party to the within entitled action; I personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of Los Angeles, State of California, at the address and the time set opposite their names, a copy of said Summons attached to a copy of the Complaint referred to in said Summons.

Name of Defendants served, City and Street Address, Date of Service:

Fox West Coast Agency Corporation by serving John Bertero, Asst. Secretary, Los Angeles, Dec. 27, 1940.

Tom Soriero sued herein as John Doe, Los Angeles, Dec. 27, 1940.

My fees for services are $1.00 for 6 miles actually traveled at 25 cents per mile, $1.50, Total, $2.50.

(Signed) EUGENE M. FINAN.

Subscribed and sworn to before me this 28 day of December, 1940.

L. E. LAMPTON,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By .....
Deputy

[Seal] MARY LYNCH
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul. 14, 1941. [30]

In the District Court of the United States
Southern District of California
Central Division

No. 1649—O'C—Civil

JEAN L. FORSYTHE,
Plaintiff,

vs.

FOX WEST COAST AGENCY CORPORATION, a corporation, et al.,
Defendants.

CERTIFICATE OF CLERK TO SUPPLEMENTAL TRANSCRIPT

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of

California, do hereby certify that the foregoing pages numbered from 1 to 30 inclusive contain full, true and correct copies of Complaint for Damages for Personal Injuries; Demurrer and Memorandum of Points and Authorities of Defendant Thomas Soriero; Minute Order of Superior Court dated January 10, 1941; Partial Dismissal; Answer of Defendant Fox West Coast Agency Corporation; Notice of Trial; Notice of Filing Petition and Bond for Removal to District Court of the United States; Petition for Removal to Federal Court; Bond on Removal of Cause to United States District Court, Southern District of California, Central Division; Minute Order of Superior Court dated June 18, 1941; Order for Removal; Certificate of Clerk of the Superior Court and Summons which constitute the supplemental record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to $11.15, which amount has been paid to me $4.30 by the Appellee and $6.85 by the Appellant.

Witness my hand and the seal of the said District Court this 22 day of October, A. D. 1942.

[Seal] EDMUND L. SMITH,
Clerk
By THEODORE HOCKE
Deputy Clerk.

[Endorsed]: No. 10169. United States Circuit Court of Appeals for the Ninth Circuit. Fox West Coast Agency Corporation, a corporation, Appellant, vs. Jean L. Forsythe, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 22, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10169.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FOX WEST COAST AGENCY, a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

OPENING BRIEF FOR APPELLANT, FOX WEST COAST AGENCY, A CORPORATION.

LASHER B. GALLAGHER,
1220 Rowan Building, Los Angeles,
Attorney for Appellant, Fox West Coast Agency Corporation, a Corporation.

Parker & Baird Company, Law Printers, Los Angeles

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No. 10169.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FOX WEST COAST AGENCY, a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

OPENING BRIEF FOR APPELLANT, FOX WEST COAST AGENCY, A CORPORATION.

Jurisdictional Statement.

This is an appeal from a final judgment at law entered by the United States District Court for the Southern District of California, Central Division, in an action for damages by reason of bodily injuries arising out of an injury sustained by the appellee on the 24th day of March, 1940, in a theater located in the City of Los Angeles and known as the United Artists Theater, at which time and place the plaintiff sat in a seat for the purpose of viewing a motion picture and certain of the metal parts of said seat were snapped apart.

The record on appeal in this case was prepared pursuant to Rule 76 of the Rules of Civil Procedure. The

action was originally commenced in the Superior Court of the State of California in and for the County of Los Angeles on December 20, 1940. The parties to said action are: Jean L. Forsythe, plaintiff, vs. Fox West Coast Agency, a corporation; John Doe Company, a corporation; Richard Roe, Ltd., a corporation; John Doe, Richard Roe and Jane Doe, defendants, as named in the original complaint when filed in said Superior Court. A copy of summons and complaint while the action was pending in said Superior Court was served upon the defendant, Fox West Coast Agency Corporation, a corporation.

On June 18, 1941, pursuant to the provisions of the judicial code in such cases made and provided, the said action was, upon petition of the defendant, Fox West Coast Agency Corporation, a corporation, removed to the District Court of the United States, Southern District of California, Central Division.

On September 18, 1941, pursuant to a motion made by the appellee at said time, an order was made granting the appellee leave to file an amended complaint. [Tr. pp. 1 and 2.]

The case was tried in the United States District Court upon the issues raised by the amended complaint, and the answer thereto filed on behalf of the appellant, Fox West Coast Agency, a corporation, and the defendant, Fox West Coast Theatres Corporation, a corporation. Said amended complaint alleged that said defendants immediately hereinabove referred to were on the 24th day of March, 1940, engaged in the business of operating and maintaining the motion picture theatre known as the United Artists Theater; that on said date

the plaintiff paid to and the said defendants accepted an admission fee, entitling the appellee to enter said theater, and that by reason of alleged actionable negligence on the part of the defendants and each of them, the appellee sustained bodily injuries and consequential damage.

Paragraphs I, II and III of the amended complaint relate solely and exclusively to the organization and existence of the defendants, Fox West Coast Agency Corporation, a corporation, Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, the fact that said corporations were and each thereof was duly licensed, to do business in the State of California, and the fact that each was organized and existed pursuant to the laws of a state other than the State of California. [Tr. p. 140.]

Said amended complaint also alleged "the requisite jurisdictional facts consisting of diversity of citizenship and amount of damages claimed." [Tr. p. 2.]

The answer filed by the appellant to the amended complaint denied all of the material allegations of the complaint, and specifically denied that the appellant, Fox West Coast Agency Corporation, a corporation, was at any time in the business of operating and maintaining the United Artists Theater, and allege that it was merely an agent of the defendant, Fox West Coast Theatres Corporation, a corporation; said answer, also, specifically denied that the Fox West Coast Agency Corporation, a corporation, at any time maintained or operated any seat in said theatre, and as a special defense alleged that the plaintiff was guilty of contributory negligence and assumption of risk. [Tr. pp. 6-11.]

The District Court, after trial before the court, entered judgment in favor of the appellee and against appellant, Fox West Coast Agency Corporation, a corporation. Judgment was entered in favor of the defendant, Fox West Coast Agency Corporation, a corporation, upon the ground that the District Court did not obtain or have jurisdiction over said defendant or of the subject of the action in so far as said defendant is concerned. [Tr. p. 146.]

Findings of fact and conclusions of law were signed, and judgment entered on the 12th day of March, 1942.

Within the time allowed by law the appellant, Fox West Coast Agency Corporation, a corporation, filed a motion for a new trial. Said motion for a new trial was orally presented and argued on the 20th day of April, 1942, and notice of ruling on said motion for a new trial, denying the same, was served upon the appellant, Fox West Coast Agency Corporation, a corporation, on the 28th day of April, 1942.

The appellant filed a notice of appeal on May 20, 1942. [Tr. pp. 147-149.]

Appellant's notice of appeal was filed on May 20, 1942. [Tr. pp. 148-149.]

The transcript of record on appeal, duly certified, consists of a statement of the case pursuant to Rule 76 of the Rules of Civil Procedure. This is a case wherein the questions presented by an appeal to a Circuit Court of Appeals can be determined without an examination of all of the pleadings, evidence, and proceedings in the court below; and the parties have prepared and signed a statement of the case showing how the questions arose and were decided in the District Court, and set forth only so

many of the facts averred and proved, or sought to be proved, as are essential to a decision of the questions by the Appellate Court. The statement has been approved by the Honorable District Judge, and has been certified to this Honorable Court as the record on appeal. [Tr. p. 153.]

The transcript of record, also, contains a copy of a superseadeas bond, certificate of the clerk of the District Court, certificate of the clerk of the United States Circuit Court of Appeals, and statement of points on which the appellant intends to rely upon the appeal. [Tr. pp. 153-161.]

The jurisdiction of the District Court of Civil suits at common law involving claims for damages by reason of bodily injuries arises from Article III, Sections 1 and 2, of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and in such inferior courts as Congress may establish, and that such power shall extend to all cases in law between citizens of different states.

Jurisdiction of civil suits at common law for damages was vested in the District Courts of the United States by the Act of Congress of March 3, 1911, Chapter 231, Section 24, Par. 1, 36 Stat. 1091; May 14, 1934, Chapter 283, Section 1, 48 Stat. 775; August 21, 1937, Chapter 725, Section 1, 50 Stat. 738; April 20, 1940, Chapter 117, 54 Stat. 143; 28 U. S. C. A., Section 41.

Removal of suits from said courts to the United States District Court is authorized by the following Acts of Congress: March 30, 1875, Chapter 137, Section 2, 18 Stat. 470; March 3, 1887, Chapter 373, Section 1, 24 Stat. 552; August 13, 1888, Chapter 866, 25 Stat. 433;

April 5, 1910, Chapter 143, Section 1, 36 Stat. 291; March 3, 1911, Chapter 231, Section 28, 36 Stat. 1094; January 20, 1914, Chapter 11, 38 Stat. 378; 28 U. S. C. A., Section 71.

Appeals from final judgment entered in the United States District Court in cases of this kind are authorized by Section 225 of the Judicial Code, as amended May 20, 1926, Chapter 347, Section 13(A), 44 Stat. 587, 28 U. S. C. A., Section 225, providing that the Circuit Court of Appeals shall have appellate jurisdiction to a review by appeal final decisions in the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of Title 28. This is not a case where a direct review of the decision may be had in the Supreme Court.

Statement of the Case.

On March 24, 1940, a certain motion picture theater, known as United Artists Theater, was being conducted as a business in the City of Los Angeles, State of California. At said time the Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, were doing business under the name "Fox U. A. Venture." All of the persons employed in and about the actual operation of the United Artists Theater, where the appellee sustained her bodily injuries, were servants of said Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation. All money collected from members of the public who entered said theater belonged to said Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation.

The evidence fails to disclose that any employee of the appellant, Fox West Coast Agency Corporation, a corporation, had anything whatever to do with the control or maintenance of the seat in the theater, which collapsed when the plaintiff sat in it, or that any employee of the appellant had anything whatever to do with the inspection of said seat, or had anything to do with the repair of the same in the event it was defective. All of the work of inspecting, repairing and maintaining said seat was done by servants of the Fox-U. A. Venture.

The appellant, Fox West Coast Agency Corporation, a corporation, as *agent,* made the arrangements pursuant to which the persons actually in charge of the said theater were placed on the payroll of the said Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, doing business under the firm name and style of "Fox U. A. Venture."

The questions involved and the manner in which they are raised are as follows:

1. Whether the evidence is sufficient to show the existence of any contractual relationship between the appellant and the appellee.

2. Whether the evidence is sufficient to support a finding that the appellant was guilty of actionable negligence.

3. Whether the trial court committed prejudicial error in admitting in evidence a complaint in a prior action commenced in the Superior Court of the State of California by the appellee and the answer to said complaint filed by the appellant, Fox West Coast Agency Corporation, a corporation.

4. Whether the trial court committed prejudicial error in admitting in evidence a certain written contract between the appellant and Fox West Coast Theatres Corporation, a corporation, United Artists Theatre Circuit, Inc., a corporation, and other corporations.

5. Whether the trial court erred in receiving evidence of conversations between one of appellant's officers and the conclusions of said officer as a witness with reference to whether or not the appellant was engaged in the theatre business as of the date of the accident.

The manner in which these points are raised is by a statement of the case pursuant to Rule 76 of the Rules of Civil Procedure.

Specification of Errors.

1. The trial court erred in admitting in evidence the complaint in a prior action, filed in the Superior Court of the State of California in and for the County of Los Angeles by plaintiff and the answer of the appellant, defendant therein, to said complaint.

The grounds of objection urged at the trial are as follows:

> "On June 4th, 1940, the plaintiff commenced a prior action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered amongst the files of said court 452891 and named as defendants the following: 'Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe, Ltd., a corporation, John Doe and Jane Doe, Only the defendant Fox West Coast Agency Corporation, a corporation, was served with summons and complaint in said action number 452891. Said defendant Fox West Coast Agency Corporation, a corporation, filed

an answer to said complaint in the said Superior Court of the State of California, in and for the County of Los Angeles, on or about June 28th, 1940."

A copy of said complaint in Superior Court action No. 452891 was received by the trial court in the case at bar, in evidence as Plaintiff's Exhibit No. 6 and a copy of the answer of the defendant Fox West Coast Agency Corporation, a corporation, in said action bearing Superior Court No. 452891, was received by the trial court in the case at bar in evidence as Plaintiff's Exhibit No. 7.

Each exhibit was received over the objections of the defendant Fox West Coast Agency Corporation, a corporation, and the proceedings showing what occurred at the time the said complaint and answer were offered and received in evidence are as follows:

"Mr. Rountree: At this time, if the Court please, we will offer the complaint and answer which have heretofore been referred to, and portions thereof introduced by the defendants, in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Jean L. Forsythe, plaintiff, vs. Fox West Coast Agency Corporation, *et al.*, and bearing No. 452891.

Mr. Gallagher: To that offer the defendants desire to make general objections and specific objections. The general objections are:

First: That the offered evidence is not competent for proof of any fact or issue raised by the pleadings in the case now being tried.

Second: Said offered evidence is not material for proof of any fact or material to any issue of fact raised by the pleadings in the action now being tried.

Third: Upon the ground that the offered evidence, to wit, the complaint and the answer in the action numbered 452891, are not relevant to any issue made by the pleadings in the case at bar.

Specifically and severally, I object to the offer of the plaintiff's complaint in said action upon the following grounds:

First: The document is a self-serving declaration of the plaintiff and is not competent for proof of any of the issues of fact raised in the pleadings in the case at bar with reference to any alleged tort liability. In other words, the defendants object to this complaint, in addition to the foregoing grounds, upon the ground that the allegations of the complaint are not competent proof of the existence of any relationship whatever as between the plaintiff and either of the defendants, or the existence of any duty between plaintiff and either of the defendants, or the breach of any assumed duty which may have existed on the part of the defendants, or either of them, towards the plaintiff, or with reference to any proximate causal connection between any alleged negligence and any injury sustained by the plaintiff, or with reference to proof of any damage sustained by the plaintiff as a proximate result of any actionable negligence, on the part of the defendants, or either of them.

Now, I desire to make a specific objection to each paragraph of the complaint as offered.

The defendants, and each of them, object to the offer of Paragraph I of the complaint upon each and all of the grounds heretofore specified, and upon the general ground that said paragraph is evidence which is incompetent, and upon the several and distinct grounds not stated in the conjunctive that it is also immaterial and is also irrelevant.

The defendants, and each of them, object to the allegations, and each and every element thereof, contained in the allegations of Paragraph II, upon each and every ground stated hereinbefore, such statement of each ground to be considered as a several and distinct objection made upon each of said grounds.

With reference to the allegations in the third paragraph, the same objections and each thereof are repeated.

With reference to the fourth paragraph, the same objections and each thereof, are repeated, and by repetition I mean to re-urge the same and each thereof to the allegations of both Paragraphs III and IV.

With reference to the allegations of Paragraph V, the same objections and each thereof are repeated and re-urged with reference to the allegations and each and every separate or distinct element contained therein.

With reference to the allegations in Paragraph VI, the defendants, and each of them, repeat and re-urge each and every objection heretofore made with reference to this offered evidence.

With reference to Paragraph VII of the complaint, the defendants, and each of them, repeat and re-urge each and every objection heretofore mentioned upon the same grounds severally as have been urged to the foregoing paragraphs.

With reference to the prayer of the complaint, the defendants, and each of them, make the same objections, and each thereof, and re-urge the same, and each thereof.

With reference to the verification to the complaint, the defendants repeat and re-urge each of the ob-

jections as hereinbefore specified to the offer of the complaint, or any specific paragraph thereof.

The defendants, and each of them, object to the offer of the answer of Fox West Coast Agency Corporation upon the following grounds:

First: The answer is not substantive proof of any fact or circumstance in issue in the case now being tried before this honorable court.

Second: The answer is not competent evidence of any fact.

Third: The answer is not material.

Fourth: The answer is not relevant.

I also specifically urge, as additional grounds of objection to the introduction of these pleadings, the proposition that pleadings in a prior action, or in the action now being tried by Your Honor, are not to be received as evidence of any of the matters therein contained. By that I mean as substantive evidence of any such matters.

Now, so far as the defendant Fox West Coast Theatres Corporation is concerned, it makes and reserves a separate and distinct objection from those in which it has joined with its co-defendant, Fox West Coast Agency Corporation, for the reason that these pleadings were not, and none of them was ever at any time served upon the Fox West Coast Theatres Corporation, and the Fox West Coast Theatres Corporation filed no pleading whatever in said action, and no matter stated in the answer of Fox West Coast Agency Corporation and no matter omitted from the answer of the Fox West Coast Agency Corporation in that action, is, in the slightest degree, binding upon the Fox West Coast Theatres Corporation.

Now, with specific reference to the allegations in the answer, the defendants, and each of them, object to

the introduction of the allegations contained in Paragraph I upon each and every ground which has been specified hereinabove in the objections to the offer of the complaint, and the same objections are made, and each thereof is made, to the offer of the allegations of Paragraph II of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations of Paragraph III of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations contained under the heading of 'As and for a first separate and special defense.'

The same objections, and each thereof, are made to the offer of the allegations, contained in the paragraph headed 'As and for a second separate and special defense', set forth in said answer:

The same objections, and each thereof, are re-urged to the prayer of said answer, and the same objections, and each thereof, are repeated and re-urged to the verification of said answer.

The Court: I will hear you.

(Argument of counsel.)

The Court: Objections overruled.

Mr. Gallagher: Might I ask, Your Honor, for the record, whether the Court is admitting evidence for all purposes with reference to each and every issue of fact raised by the pleadings, or whether the Court is admitting this complaint and answer for some specific purpose?

The Court: I am admitting them, as I will state again, so that the record will be clear, and so that counsel will be protected if there is any error in the ruling—I am admitting them the same as if the plaintiff in this action had written a letter containing these

statements to the defendant, or the same parties, or the defendant represented by Mr. Bertero in the present action, and if that defendant had written a letter to the plaintiff making the denial and admissions; the same as if it were in the form of correspondence. I don't know that I can make it any clearer.

Mr. Gallagher: Well, then, I assume, from what Your Honor has said, that the Court is admitting this evidence for the sole and exclusive purpose of a declaration against interest, or an admission on the part of the Fox West Coast Theatres Corporation, and not for any purpose other than that, and I ask the Court to so limit the effect of the evidence without waiving the objections, or any of them, that have been made.

The Court: That is correct. Proceed." [Tr. pp. 52-59.]

The substance of the evidence admitted is as follows:

"In the Superior Court of the State of California, in and for the County of Los Angeles.

Jean L. Forsythe, Plaintiff vs. Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe, Ltd. a corporation, John Doe and Jane Doe, Defendants.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES.

Comes now the plaintiff and for cause of action against the above named defendants, and each of them, alleges:

I.

That during all the times herein mentioned the Fox West Coast Agency Corporation, has been and now is a corporation duly organized and existing un-

der and by virtue of the laws of the State of Delaware, duly licensed to do business in the State of California, with its principal place of business in the County of Los Angeles, State of California.

II.

That the defendants John Doe Company, a corporation; Richard Roe, Ltd., a corporation, John Doe and Jane Doe are sued herein under fictitious names as their true names are unknown to plaintiff herein, and plaintiff asks permission upon ascertaining the true names of said defendants to insert their true names in lieu of said fictitious names.

III.

That during all the times herein mentioned, the defendants, John Doe Company and Richard Roe, Ltd. have been and now are corporations organized and existing under the laws of the State of California, with their principal place of business in the County of Los Angeles, State of California.

IV.

That the defendants, and each of them, operate and maintain a motion picture theater known as the United Artists Theater open for the general public to view motion pictures, said theater being located in the City of Los Angeles, County of Los Angeles, State of California.

V.

That plaintiff on or about the 24th day of March, 1940, paid an admission to the aforesaid theater located on South Broadway in the City of Los Angeles, County of Los Angeles, State of California, to view a motion picture offered by said defendants to the general public; that plaintiff was shown to a seat in said theater by an attendant and/or employee of the defendants herein; that due to the care-

lessness and negligence of the defendants, and each of them, and their employees, plaintiff upon sitting on said seat was violently precipitated to the floor of said theater, by reason of the broken condition of said seat and the collapsing thereof, all of which caused her great pain and severe shock to her nervous system, bruises, abrasions and contusions, and a severe strain and wrenching of her lower back, all of which was the direct and proximate result of the carelessness and negligence of the defendant aforesaid; that plaintiff is informed and believes that the above named injuries are permanent, all to her damage in the sum of Twenty Thousand Dollars ($20,000.00).

VI.

That as a result of the injuries sustained by the plaintiff, as aforesaid, plaintiff was forced to incur doctors and physicians services in the reasonable sum of $217.50; nurses hire in the sum of $187.51; hospitalization and ambulance hire in the sum of $165.97, medicines, medical supplies and supports in the sum of $112.95, all to her damage in the sum of $683.93.

That plaintiff will be forced to incur further expenses for treatment of said injuries and will ask leave of court to amend this complaint to include said further expenses incurred.

VII.

That plaintiff at the time of said injury was employed and receiving compensation in the sum of $135.00 per month, and that by reason of the injuries aforesaid, plaintiff was compelled to and did remain away from her work for a period of two months,

all to her damage in the sum of $270.00. That plaintiff is still unable to work at this time and for an indefinite time in the future, and will ask leave of this court to amend this complaint to include her damage for loss of wages.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of Twenty Thousand Dollars ($20,000) general damages; for the sum of Nine Hundred Fifty-three and 93/100 Dollars ($953.93) special damages, and for a further sum as special damages to be ascertained at the time of trial, together with her costs of suit herein incurred, and for such other and further relief as to this court may seem meet and just.

ROSECRANS & EMME
By OTTO J. EMME
Attorney for Plaintiff.

State of California, County of Los Angeles—ss.

Jean L. Forsythe being by me first duly sworn, deposes and says: that she is the Plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of his (her) own knowledge, except as to the matters which are therein stated upon his (her) information or belief, and as to those matters that he believes it to be true.

JEAN FORSYTHE.

Subscribed and sworn to before me this ..... day of May, 1940.

.....

Notary Public in and for the County of Los Angeles, State of California.

PLAINTIFF'S EXHIBIT No. 7.

In the Superior Court of the State of California in and for the County of Los Angeles.

Jean L. Forsythe, Plaintiff vs. Fox West Coast Agency Corporation, a corporation, *et al.*, Defendants. No. 452-891.

ANSWER.

Comes now the defendant Fox West Coast Agency Corporation, a corporation, and answers plaintiff's complaint as follows:

I.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraphs II, III, VI and VII of said complaint and placing its denial thereof upon said ground, denies said allegations and each thereof.

II.

Defendant denies each and every allegation contained in paragraph V of said complaint from and including the word 'that', line 20, page 2 to and including the figures '($20,000.00)', line 32, page 2 of said complaint.

III.

Defendant denies that plaintiff has been damaged in the sum of $20,953.93 or in any other sum whatsoever or at all.

As and for a First, Separate and Special Defense, defendant alleges that on or about the 24th day of March, 1940, the plaintiff so negligently, carelessly and recklessly conducted herself while in the United Artists Theatre in the City of Los Angeles, California, immediately prior to and at the time she seated herself in a certain seat in said theatre, that any in-

jury or damage sustained by plaintiff was a proximate result of said negligence, carelessness and recklessness on her part.

As and for a Second, Separate and Special Defense, defendant is informed and believes and therefore alleges that the plaintiff, at all times mentioned in her complaint, was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew or should have known that seats in theatres and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theatre was designed for the purpose of accommodating a person of the grossly excessive weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in defendant's theatre in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff.

Wherefore, defendant prays that plaintiff take nothing by her said complaint and that defendant have judgment for its costs incurred and to be incurred herein.

LASHER B. GALLAGHER

Attorney for defendant Fox West Coast Agency Corporation, a corporation.

State of California, County of Los Angeles—ss.

John B. Bertero, being by me first duly sworn, deposes and says: that he is the Assistant Secretary of Fox West Coast Agency Corporation, a corporation, one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN B. BERTERO.

Subscribed and sworn to before me this 28th day of June, 1940.

ANN FRIEDLUND

Notary Public in and for the County of Los Angeles, State of California."

2. The trial court erred in the admission of evidence consisting of conversations between one of the appellant's witnesses and an officer of the appellant. One of the plaintiff's attorneys, Bayard R. Rountree, on or about the 11th or 12th day of June, 1941, testified with reference to certain conversations offered for the purpose of proving that the Fox West Coast Agency Corporation, a corporation, was actually operating the United Artists Theater in Los Angeles on March 24, 1940.

The questions asked for the purpose of eliciting the conversations were objected to as follows:

"Mr. Gallagher: That is objected to on two grounds. First, it calls for hearsay, and second, it calls for a conclusion of the witness based on hearsay, and it would not be competent for any fact in this case. The mere fact that a man is secretary of a corporation does not clothe him with the right to make

declarations with reference to past events, or have any conversation which would have the effect of establishing substantive proof of the existence of past events or past conditions." [Tr. p. 60.]

"Mr. Gallagher: I move to strike out the answer of the witness on the ground, that in effect, it is stating hearsay, and there is no evidence proving or tending to prove that Mr. Bertero had any authority whatever to speak for or on behalf of either defendant in this case with reference to any fact in issue in the case now being tried. The evidence must prove that whatever statement was made was made in the course and scope of some actual authority. The mere fact that a man is secretary of a corporation does not give him the right to go out, or even in his office, and have conversations with somebody with reference to some past event.

Q. By the Court: As I understand it, this is the same individual who signed and verified the answers to the complaints in this action? A. That is right.

The Court: Do I understand that counsel repudiates his authority to verify those answers, and that the verifications are false oaths of the secretary? Is that my understanding?

Mr. Gallagher: No, no, Your Honor.

The Court: I understood you to say he could not speak for the corporation. If he could not speak for the corporation, then he has made false oaths in verifying these answers.

Mr. Gallagher: Not at all.

The Court: Or he can only speak when it is in the interest of the corporation but he must be silent when anything comes out of his mouth that is unfavorable to the corporation; is that correct?

Mr. Gallagher: No; that is not what I contend at all.

The Court: All right. Let us have it.

Mr. Gallagher: What I contend is there is no evidence proving or tending to prove that Mr. Bertero was authorized to speak to Mr. Rountree with reference to any answer which may have been filed or which was going to be filed in any lawsuit. Furthermore, there is no evidence proving or tending to prove that Mr. Bertero was authorized by either corporation to have any conversation with Mr. Rountree about what had happened at the theatre on March 24, 1940, or at any other time, or at all, and I submit that that has nothing to do with his verification of their answer.

The Court: In other words, your position is that an officer of the corporation can verify an answer, but he cannot be inquired of with reference to his verification of the particular answer in that particular action. Now, he was either authorized to verify the answer or he was not.

Mr. Gallagher: Certainly, he was authorized to verify the answer.

The Court: But you cannot inquire of that man who verified the facts in that answer as to anything about the facts in the answer or connected with that transaction?

Mr. Gallagher: Yes. He is not here as a witness, you understand.

Direct Examination (Resumed).

Mr. Emme: Will you read the last question and answer, please.

(Last question and answer read by the reporter, together with motion to strike.)

The Court: The motion is overruled.

Q. By Mr. Emme: By referring to the case in the Superior Court, you were referring to the case pending in the Superior Court, No. 459395, and case No. 452891, in the Superior Court of Los Angeles County? A. That is correct.

Mr. Gallagher: If Your Honor please, for the purpose of avoiding the renewal of objections which were made with reference to the testimony of this witness in regard to conversations with Mr. Bertero, I wonder if counsel is willing to stipulate, if it is satisfactory to Your Honor, that all of this line of testimony having to do with conversations with Mr. Bertero shall be deemed to have been objected to upon each and every ground stated during the testimony of Mr. Rountree with the same force and effect as though restated verbatim?

Mr. Emme: Yes.

The Court: It will be so understood." [Tr. pp. 61-64.]

Upon the same subject matter, objections made to the questions asked of Mr. Bertero by plaintiff's counsel are as follows:

"Q. By Mr. Emme: Will you state the conversation you had with Mr. Rountree in the early part of June, 1941?

Mr. Gallagher: Objected to on the ground it is immaterial and not competent as proof in this case, no foundation laid, no showing of the authority of the witness at that time to have any conversation with Mr. Rountree with reference to any past event or with reference to any condition which may have existed in the past.

The Court: I think you better lay the foundation in the face of an objection of that kind. The witness has testified as to his authority and position at this

time, but there is no evidence as to his authority or position in 1941.

Mr. Gallagher: I will stipulate that he was assistant secretary of the corporation at the time the conversation occurred. The objection is based on this proposition: That there is no proof that Mr. Rountree and Mr. Bertero were discussing any business transaction in which the Fox West Coast Agency was interested, or that they were discussing any matter within the scope of Mr. Bertero's authority as assistant secretary of the corporation.

The Court: Of course, I cannot pass on that until I know what he is going to say.

Mr. Gallagher: And it is an attempt to vary the terms and provisions of a written instrument, to wit, Plaintiff's Exhibit No. 5, which is plaintiff's evidence produced here." [Tr. pp. 70-71.]

The substance of the evidence admitted relates to the legal effect of the answer which was filed by Fox West Coast Agency Corporation, a corporation, in the prior action commenced by plaintiff in the Superior Court of the State of California, in which action the answer failed to make any mention of the allegation contained in the complaint "that the defendants, and each of them, operate and maintain a motion picture theater known as the United Artists Theater, open to the general public to view motion pictures; said theater being located in the City of Los Angeles, County of Los Angeles, State of California," and the legal effect of the contract introduced in evidence in the case at bar as Plaintiff's Exhibit No. 5; and also, Mr. Bertero's opinions and conclusions with reference to whether the Fox West Coast Agency Corporation, a corporation, was operating the theater in the sense that appellee was a business invitee of the appellant. The evidence

referred to is in the Transcript of Record on the following pages: 64 to 77.

3. The finding of fact that the defendant, Fox West Coast Agency Corporation, a corporation, at all times mentioned in plaintiff's amended complaint was engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater is erroneous, because the evidence shows without conflict that the Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, doing business under the name "Fox U. A. Venture," were operating and maintaining said theater, and that the appellant, Fox West Coast Agency Corporation, a corporation, was merely an agent of the other corporations, and that no servant, agent, or employee of the appellant, Fox West Coast Agency Corporation, a corporation, had any connection whatever with the business, excepting to employ, on behalf of the corporation which actually operated and maintained the United Artists Theater, such persons as were physically in possession of the said theater and who actually operated and maintained the same.

4. The finding that the plaintiff paid an admission to the appellant is erroneous for the reason that the evidence shows without the slightest conflict that the money which the plaintiff paid for her ticket belonged to the corporations doing business under the name of Fox U. A. Venture.

5. The finding of the court that the appellant was careless and negligent in that employees of the appellant carelessly and negligently maintained and operated the seats in the United Artists Theater is erroneous, for the reason that there is no evidence whatever in the record showing that any servant or employee of the appellant had anything

whatever to do with the maintenance or operation of any seat in the theater, all of the evidence showing that each and every person in said theater was an employee of the corporations doing business as Fox U. A. Venture.

6. The conclusion of law that plaintiff should have and recover judgment in the sum of twenty-five hundred ($2500.00) dollars against the Fox West Coast Agency Corporation, a corporation, is erroneous, for the reason that in legal effect the trial court found that the plaintiff failed to inspect or pay any attention to the seat or the condition thereof, and that she failed to discover whether the same was or was not in a safe condition, and failed to ascertain or discover whether the same was or was not loose, and failed to make any test whatever of said seat; and permitted her body to come in severe and unusual contact with the parts of said seat; and caused the said seat to be subjected to an extraordinary or unusual strain or stress; and forced a portion of her body between the arms of said seat in a manner in which the said seat was not designed to be used and caused an extraordinary or unusual strain and stress on the arms of said seat, to the sides thereof, and away from each side of the plaintiff's body; and used the arms of said seat for a purpose for which they were not designed; and failed to take into consideration the fact that the seat was designed to accommodate persons of average bulk and weight; and forced her body into said seat.

7. The findings against the defense of contributory negligence are erroneous for the reason that the evidence shows that the plaintiff subjected the metal parts of the seat to unusual and extraordinary strain and stress, and negligently failed to make any tests whatever of the seat, and negligently failed to exercise ordinary care.

ARGUMENT OF THE CASE.

I.

There Is No Evidence Showing That There Was Any Relationship Between the Appellee and the Appellant, Except That They Were Strangers to Each Other and Occupied That Relationship Which One Member of the Public Bears to Another Member of the Public; and the Evidence Fails to Show That the Appellant Violated or Breached Any Duty Which It Owed to the Appellee.

The argument now presented relates specifically to the third, fourth, and fifth specifications of error hereinabove set forth. Said specifications relate to the same general subject matter consisting of the claim of the appellant that there is no evidence showing the existence of any duty owed by the appellant to the appellee, or the breach of any duty owed by the appellant to the appellee.

The only evidence offered by the plaintiff with reference to the alleged connection of the appellant with the business of operating the United Artists Theater (aside from the conversations between the witness, Rountree, and John B. Bertero, and the conclusions and opinions of John B. Bertero, which will be presented in a subsequent point in this brief) is a written contract. The document is too lengthy to quote in full as a part of the brief because of the fact that the appellant is restricted to an 80-page brief, and, therefore, the contract, Plaintiff's Exhibit No. 5, is set forth in the appendix hereto attached. This contract is printed in full in the transcript of record [pp. 18-38 incl.]. The substance of the contract, in so far as it relates to the appellant, Fox West Coast Agency Corporation, a corporation, is that the corporations doing busi-

ness as Fox U. A. Venture, surrender to and vest in appellant the management of four separate theaters, and that appellant

> "shall manage and operate the theater for the joint benefit of the parties hereto, and as such manager or operator shall have, among other things, the sole right and authority, and obligation as *agent* for the other parties hereto, (a) To select, purchase, license, lease and/or book motion pictures to be exhibited in the theatres; (b) to employ the personnel which in the opinion of Agency may be necessary for the successful operation of the theatres, including a local manager for each of the theatres, and one district manager, for all of the theatres; . . ." [Tr. p. 21.]

For its services as such manager, the appellant was to receive 5¼% of the gross income of the four theaters. [Tr. pp. 22-23.]

The gross income of the theaters was to be held in trust for the benefit of the corporations owning the theaters. [Tr. p. 23.] Appellant had absolutely no interest in the net profits of the business. [Tr. p. 27.]

> "This agreement is made solely for the benefit of the parties hereto and shall not be construed to render Agency (appellant) liable to any person, firm or corporation other than the parties hereto, . . ." [Tr. p. 38.]

> "Nothing herein is intended or shall be construed so as to create a partnership between or among the parties hereto, or to make any of the parties hereto a partner of any other or all of the remaining parties hereto." [Tr. pp. 36-37.]

The testimony of the witnesses with reference to the operation of the United Artists Theater and the maintenance of the equipment contained therein is as follows:

John B. Bertero, called as a witness on behalf of appellee, testified, in part, as follows:

In my capacity as assistant secretary of Fox West Coast Theatres Corporation, a corporation, I have knowledge of a certain entity referred to as Fox U. A. Venture. All of the money taken in from the sale of tickets, the income from the conduct of the business of the United Artists Theater at 933 South Broadway went into a bank account kept separate and apart from any bank account of the Fox West Coast Agency Corporation, a corporation.

The payroll records of all of the persons from the manager of the theater down to the lowest employee in scale in that theater during the month of March, 1940, were kept in the name of Fox U. A. Venture, a bookkeeping title set up to economically describe the arrangement so far as accounting and other methods were concerned under Plaintiff's Exhibit No. 5. The name, "Fox U. A. Venture", refers only to United Artists Theatre Circuit, Inc., a corporation, and Fox West Coast Theatres Corporation, a corporation.

After the 5.25% of the gross income of the United Artists Theater at 933 South Broadway was deducted and the payment of salaries of employees in that theater, including the manager of that theater, were deducted, the balance of that money went into a separate bank account and ultimately what we call "distributions of the Venture" were distributed to the two parties to the Venture: that is, the Fox West Coast Theatres Corporation, a corporation, and the United Artists Theatre Circuit, Inc., a corporation.

I obtained from the original records kept by the Fox U. A. Venture the payroll showing employees at the United Artists Theater at 933 South Broadway for the entire month of March, 1940. [Tr. pp. 71-79.]

> "It is stipulated by and between the parties that it would be impracticable to attempt to make a copy of the payroll sheets and employer's report of taxable wages paid, received in evidence as Defendants' Exhibits C and D, because of the fact that a typewriter cannot duplicate the exact form of contents of said exhibits in the manner in which the contents of said exhibits are set forth therein and also that it would be impracticable to attempt to print the exhibits on the size paper used by printers in the printing of the record on appeal and it is therefore stipulated that the originals of the Defendants' Exhibits C and D be sent to the appellate court in lieu of copies and that the above entitled court may make such order therefor and for the safe keeping, transportation, and return thereof, as it deems proper, and that in preparing briefs in the Circuit Court of Appeals the parties may print in their briefs a narrative of the contents of said exhibits which they or either of them desire to call to the attention of the Circuit Court of Appeals.
>
> "It is also stipulated that it is impossible to reproduce by means of a typewriter or printed words Defendants' Exhibits F, G, H and I, said latter exhibits being portions of broken iron, testified by defendants' witnesses to have been part of the seat occupied by the plaintiff in the theater." [Tr. pp. 90-91.]

Defendant's Exhibits C and D contain the names of each and every person who did any kind of work at the United Artists Theater, where the plaintiff sustained her

injuries. The documents consist of payroll records kept by the Fox U. A. Venture and employer's reports of wages of all employees as made to the State of California and the Treasury Department of the United States Government, showing wages paid for the month of March 1940. In the return made to the State of California and to the Treasury Department, Fox U. A. Venture is the entity shown as the employer. The payroll records show the Fox U. A. Venture as the employer. None of these records show the appellant as the employer of any of the individuals in the theater.

These documents are compiled in such form as to make it impossible to print them in the brief, and all that can be done is to state the substance and legal effect of the documents. The court of necessity will examine the original exhibits and such inspection will show that all of the persons who were actually in the theater were employees of the Fox U. A. Venture.

With the foregoing explanation with reference to documentary evidence, appellant will now proceed with the further testimony of Mr. Bertero.

The employer's report of the taxable wages paid to each employee for the quarter ending March 31, 1940, was taken from the records of Fox U. A. Venture, kept in the regular course of business, which shows the employer's report of taxable wages paid to each employee in the United Artists Theater, 933 South Broadway, as of March, 1940.

Fox U. A. Venture is not a corporation. Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, jointly are entitled to the proceeds from the operation of several

theaters, including the United Artists Downtown Theater. Books of account are kept for the two parties, and expenses are paid by the two parties out of a common fund, and they receive the residuum of whatever is left from the operation of those theaters. The handling fee, or whatever you may call it, of the Fox West Coast Agency Corporation in the sum of 5.25% is obtained from the same fund. All of the proceeds from the United Artists Theater are put into this fund. [Tr. pp. 84-86.]

Harry L. Wallace, one of the defendant's witnesses, testified in substance as follows: The payroll records were prepared by me and were typed from rough copies made by the witness at the theater. The records truly and correctly reflect the names of each and every person who performed any work of any kind in that theater. The names of the janitors are as they appear on the payroll record.

The seats would be pushed up by the janitors twice a day, and there had been an inspection of the equipment in general including the seats, in addition to that made by the janitors daily, between December 29, 1939 and March 24, 1940; that those who made the daily inspection were the witness and a Mr. Corley, who was the floorman, and certain girls designated to certain sections in the theater to inspect; that in addition to the inspections made by the witness, Mr. Corley and the janitors, the usherettes, also, made inspection, and that on and prior to March 24, 1940, before the appellee was injured, the witness had not noticed anything wrong with the seats in the row that the appellant was then occupying. On March 24, 1940, in the morning the house was completely full. The usherettes had filled every seat. There were no more vacant seats. Every seat in that theater was occupied from about 9:45 a. m. until 1:30 p. m. by persons who were viewing the picture.

Fox U. A. Venture paid my salary. That is the same entity that was referred to by Mr. Bertero when he was testifying here.

Mr. Wallace, also, testified with reference to the number of the seats in the downstairs portion of the theater, and that he personally inspected that portion of the house which included the seat involved in the accident which is the subject of this litigation and that the seat was all right in the morning when he inspected it. The inspection he made was that the seat appeared tight to him, and that if the seat had been broken the seat would not raise up and down.

The witness testified that when he inspected the seat after the accident, part of the metal portion of the seat had been ripped clear out of the seat portion itself, and that the metal portion had been broken. [Tr. pp. 105-122.]

Defendant's witness, Robert Arroyo, testified that on the 24th day of March, 1940, he was working at the United Artists Theater, 933 South Broadway, as a janitor, and that the same crew working there on said date had worked for a long time before and after that date; that the seats in the theater were cleaned every night; that in cleaning the seats he took hold of the seats; that after cleaning, the janitor had to raise every individual seat; that if he discovered any seat to be loose, the janitor had to report it to the manager or one of the men that fixes seats in the theater; that there are some of the men there that fix the seats. [Tr. pp. 123-124.]

James E. Corley, defendant's witness, testified that in the month of March, 1940, he was employed at the United Artists Theater, 933 South Broadway, Los Angeles, as

floor manager; that on said date he examined the second seat from the end in row 13, which was a seat that had been involved in an accident involving the appellant; that very shortly after he spoke to the appellant, he examined the seat and the pieces of broken metal, and that those pieces of metal are Defendant's Exhibits F, G, H, and I, and that except for changes that may have occurred along the fractured lines of the metal, the pieces were in the same condition at the time he testified as they were when he saw them in the theater; that he went down to the particular row of seats, and that the second seat in from the isle was empty at that time; that the left side of the seat was down, and as he put his hand on it, it would give just a fraction; that it did go up and down just a little bit, and that he could tell by putting his hand under it that it was broken; that is, the second seat from the isle; that there was no part of the seat other than the piece of metal which was broken or out of order, and that when he used the words "that metal", he referred to Defendant's Exhibits F, G, H, and I. [Tr. pp. 136-138.]

Vance Cudd, defendant's witness, testified as follows:

> "In the month of March, 1940, I was working as janitor at the United Artists Theater, 933 South Broadway, Los Angeles. I had been working there for three or four months and worked during the entire month of March, 1940. In doing my work as a janitor and with reference to the seats in the rows within the area being cleaned each day, we just came in direct contact with them to clean out between the seats and underneath the seats.
>
> "We raised the seats up with our hands and left them up for the next day. We raised the seats with our hands. In my work in the theater before March,

1940, I had had occasion to raise and lower every seat in the house. In the course of my work I became familiar with the seats, and from my experience in handling those seats I could tell by raising or lowering them whether the seat was broken or loose." [Tr. pp. 138-140.]

Gough L. Cheney, defendant's witness, testified as follows:

"I am a chemist and metallurgist, engaged in that occupation since 1910. I have had occasion to examine metal during that time and during my practice as a metallurgist. I have in my possession certain pieces of cast iron which I first saw about June 1940. I went to the United Artists Theater at 933 South Broadway since I obtained these pieces of cast iron and examined the general construction of the seats in that theater.

"From an examination of the fractured surface and the specimens, it is my opinion that the breaks or fractures occurred practically at the same moment; that is, instantaneously. I found no defect in the metal which could possibly be discovered by any kind of an examination, excepting disintegration of the entire fixture or fitting. The load was supported by these two surfaces, which fit into a corresponding groove in the frame of the seat, the load being carried by these two pieces with a bolt holding them in place."

The two parts just referred to by the witness are Defendant's Exhibits F and G; F being the larger portion and G being the smaller portion, and the portion of the casting at the farthest end from the hinge, the smaller

section, is the part that was referred to as the weight-bearing portion.

"From my examination of the seats in the theater and inspection of the mechanical construction and design of the seats, my opinion as to the cause of the fracture of the pieces marked F and G is that they were subjected to a load greater than the cross section of the metal could withstand. A piece of metal is subjected to a load both by lowering a weight into the seat and also by impact.

"A metal part which is apparently sound might break, even though the total weight which was involved was less than the total weight which that part would sustain, by sudden impact or a moving weight, which would give it more foot pounds of energy, or by reducing the bearing surface on the cantilever, such as would occur by a side thrust, which would push the bearing surfaces away, or which would allow them to move and thereby change the direction of the applied force.

"Assuming that a person whose hips were wider than the space between the insides of each arm would sit in such a seat, and assuming that such person would have to force his or her body into that space, any side thrust applied to the arms of the chair would have a direct action on the cantilever bearing of the seat bracket. It would throw stresses in there, and it would be hard to determine just what the ultimate effect would be, but the leverage action there would be rather great, as the design of that portion of the seat does not consider absorbing stresses in that direction.

"Speaking particularly with reference to the seats in the United Artists Theater downtown and their

conformity, so far as design and construction is concerned, they are of typical cantilever construction.

Defendant's Exhibits H and I, the large part being H and the small part being I, fitted together, are typical of the construction of the seat that was fractured. That particular piece of metal in my opinion was fractured. There is no possible indication of any defective metal. In my opinion that fracture occurred at the same time as the fracture of the other parts marked Defendant's Exhibits F and G.

"This portion that I have in my hand is a part of the support on the left side of one of those seats in that theater as the person sits in it and faces the screen.

"I have attempted to fit these two parts together, that is, Defendant's Exhibits F and G, and these which have been marked Defendant's Exhibits H and I. They fit together; they are parts of a unit.

"I think all of these fractures occurred at the same time, as close as anything could happen in sequence. Undoubtedly one particular part broke first, followed immediately by the other. It may have been a fraction of a second, but one did occur first. It is my opinion that the fracture on Exhibit F occurred first because Exhibit H acted only as a guide; did not necessarily carry any load itself. In other words, something undoubtedly twisted the seat out of position in order to break the guide.

"It is, in my opinion, that these fractures occurred in Defendant's Exhibits F and H not because a greater weight was placed on the seat than it was designed to bear, but that a greater load was placed on the metal than the particular bearing surface of this cantilever, Defendants' Exhibit F, was able to withstand." [Tr. pp. 125-135.]

There is no legal foundation for any decision or judgment in favor of the plaintiff and against the Fox West Coast Agency Corporation, a corporation.

The defendant Fox West Coast Agency Corporation, a corporation, cannot be a tort feasor. The only tort feasors known to the common law are natural persons. A corporation is never guilty of committing a negligent act but is responsible, if at all, by resort to the doctrine of *respondeat superior.*

The evidence in the case at bar is wholly barren of proof that any agent or servant of the Fox West Coast Agency Corporation, a corporation, negligently or otherwise maintained or operated any seat in the United Artists Downtown Theater in Los Angeles. To the contrary, the evidence demonstrates that the only natural persons who had anything to do with the maintenance or operation of any seats in the theater were the employees of the Fox U. A. Venture, a joint enterprise conducted by the Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation.

The plaintiff is not, in so far as the defendant Fox West Coast Agency Corporation, a corporation, is concerned, entitled to the application of the doctrine *res ipsa loquitur* for the reason that there is no evidence proving or tending to prove that the Fox West Coast Agency Corporation, a corporation, had or was entitled to the exclusive management or control of the seat which collapsed when appellee sat upon it.

In the case of *Parker v. Granger,* 4 Cal. (2d) 668, 52 Pac. (2d) 226, the California Supreme Court definitely holds that the doctrine of *res ipsa loquitur* is never applicable unless the evidence shows that the instrumentality

which caused the damage was in the exclusive possession of the defendant sought to be charged with responsibility at the very instant when the accident happened. The most that can be contended for by appellee in this case is that, if the evidence fails to show exclusive control of the instrumentality at the time of the happening of the accident, the proof *must* show that at the time of the commission of the negligent act or omission which proximately caused injury to plaintiff, the seat was in the exclusive control of the appellant Fox West Coast Agency Corporation, a corporation.

There is no proof in the record in this case that the Fox West Coast Agency Corporation, a corporation, at any time had or was entitled to the exclusive or any control of the seat involved in the accident.

It is the law of the State of California, and in all substantial common law jurisdictions, that whenever the proof shows the actual cause of an accident, the doctrine *res ipsa loquitur* is not applicable. *Res ipsa loquitur* is not a rule of liability but is merely a rule of evidence.

The testimony in the record shows, without contradiction, that the cause of the collapse of the seat was the breaking of a metal part; that the break was new and that it resulted from an application of force and that there was no defect in the metal.

The evidence also shows, without contradiction, that prior to the time the plaintiff entered the theater, the seat had been occupied by at least one other person for a period of approximately three hours. It cannot be inferred that the seat was in the broken condition at the time the plaintiff commenced to sit in it. If it had been broken prior to the time the plaintiff sat in it, no other patron of the

theater could have used the seat for the purpose of viewing the picture.

The manager of the theater testified that on the day of the accident and before any patrons entered the theater at all, he personally inspected a group of seats amongst which was the seat in question and that at the time of said inspection the seat was not loose and appeared, from physical contact, by taking hold of the seat and moving it up and down, to be tight and in good mechanical condition.

If there was any negligent inspection of this seat and if there was any condition about the seat which could have been ascertained by an ordinarily prudent inspection on the day of the accident, prior to the time the plaintiff entered the theater, the only natural person who was guilty of any negligent act was the manager of the theater. The evidence conclusively establishes, to the point of absolute demonstration, that the manager of said theater was an employee of the Fox U. A. Venture.

The substantive law of the State of California, applicable to the foregoing situation is contained in code sections.

Section 2338 of the Civil Code provides as follows:

> "Unless required by or under the authority of law to employ that partciular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and

for his willful omission to fulfill the obligations of the principal."

Section 2343 of the Civil Code provides as follows:

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature."

Section 2351 of the Civil Code provides as follows:

"A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent."

The fact that the Fox West Coast Agency Corporation, a corporation, employed this manager for the Fox U. A. Venture, does not make the Fox West Coast Agency Corporation, a corporation, responsible to the plaintiff for the acts of the manager. The only corporation responsible for any actionable negligence on the part of the manager of the theater in failing to make a reasonably careful inspection, if he did so fail, would be the corporation which had employed him and whose servant he was.

What negligence is shown in the evidence to have been fastened upon any servant or employee or officer of the defendant Fox West Coast Agency Corporation, a corporation?

The learned trial judge evidently concluded from the written contract, Plaintiff's Exhibit No. 5, that the Fox West Coast Agency Corporation, a corporation, was a co-proprietor of the theater and that it, with the corporations doing business under the name, Fox U. A. Venture, was engaged in a partnership.

It is elementary that two or more corporations cannot become partners. That is so for the reason that all of the affairs of a corporation are by statute subject to the control of the board of directors and officers of a corporation and the corporation cannot be bound by the acts or omissions of anyone excepting its duly authorized officers and board of directors. In the law governing partnerships, each partner is liable for the acts of the other in and about the conduct of the partnership business. In California partnerships cannot be organized excepting by natural persons. In addition to the foregoing observation, the contract itself provides that the Fox West Coast Agency Corporation, a corporation, is not a partner of any other party to the contract and that there is nothing in the contract intending to create any partnership. The contract also definitely provides that the Fox West Coast Agency Corporation, a corporation, is nothing but an agent.

The plaintiff is not a party to the contract, Plaintiff's Exhibit No. 5, and cannot predicate any part of her cause of action thereon.

Under the substantive law of the State of California, the Fox West Coast Agency Corporation, a corporation, cannot be held liable to the plaintiff.

In support of this point, the defendant Fox West Coast Agency Corporation, a corporation, in addition to referring to the code sections hereinabove set forth, cites the case of *Thurman v. The Ice Palace,* 36 Cal. App. (2d) 364, 97 Pac. (2d) 999. In that case the manager of the Associated Student Body of the University of Southern California was sued by the plaintiff on the theory that the Ice Palace and the Associated Student Body of the University of Southern California were conducting a business enterprise consisting of a hockey game for profit and that the plaintiff having paid an admission fee was an invitee of not only the Ice Palace and the Associated Student Body of the University of Southern California but also of the manager of said Associated Student Body of the University of Southern California. The trial court granted a motion for a directed verdict in favor of all of the defendants. The District Court of Appeal reversed the judgment entered upon the directed verdict in favor of the defendants Ice Palace and Associated Student Body of the University of Southern California *but affirmed the judgment as to all of the other defendants, including Arnold Eddy, the manager of the Associated Student Body of the University of Southern California.*

The court says:

> "With reference to the defendants who move to dismiss the appeal or affirm the judgment, there is a total lack of any evidence showing that they were in any way connected with the management or shared in the proceeds or had any interest in the venture. Therefore, the judgment should be affirmed as to them."

If a person receiving remuneration for acting as a manager for and on behalf of the actual proprietor of a business enterprise is not responsible for an injury sustained by an invitee, it is difficult to understand how the Fox West Coast Agency Corporation, a corporation, is subject to liability in the case at bar.

There is no doubt about the proposition that in the *Thurman* case, Arnold Eddy, the manager, received a salary from the Associated Student Body of the University of Southern California and that his remuneration depended in great part upon the business activities of said Associated Student Body. If the Associated Student Body collected no money it would have nothing with which to pay a salary to its manager. It is therefore apparent that the District Court of Appeal, in the *Thurman* case, did not use the language "the management or shared in the proceeds or had any interest in the venture," in any sense excepting with reference to proprietorship; otherwise, the court could not have affirmed the judgment in favor of Arnold Eddy. Arnold Eddy stood in the same relation to the Associated Student Body of the University of

Southern California as the Fox West Coast Agency Corporation, a corporation, stood in relation to the Fox U. A. Venture.

Counsel for the Fox West Coast Agency Corporation, a corporation, has made an exhaustive search of the authorities and being unable to find any such case, challenges counsel for the plaintiff to submit a single authority holding that the manager of a theater is personally responsible for injuries to a patron of the theater when the manager is not the proprietor of the theater.

All of the cases which have been read by defendant's counsel, the text books and encyclopediae, restrict their discussion to the liability of the *proprietor* of the theater or place of amusement. In 62 *Corpus Juris,* 863, the rule is stated as follows:

> "The *proprietor* of a place of public amusement is required to use ordinary or reasonable care to put and keep the premises, appliances, and amusement devices in a reasonably safe condition for persons attending; and if he fails to perform his duty in this regard, a patron who is injured in consequence thereof is entitled to recover for the injury sustained."

It is respectfully submitted that the record in this case fails to show the existence of any contractual relationship between the appellant and appellee, or any negligence whatever on the part of the appellant.

II.

The Trial Court Erred in Admitting in Evidence the Complaint and Answer in a Prior Action Filed by Plaintiff in the Superior Court of the State of California in and for the County of Los Angeles.

The grounds of objection made have heretofore been set forth under specification number I.

The particular purpose of appellee in offering the complaint and answer in the prior action was to show that on March 24, 1940, the appellant was operating and maintaining a motion picture theater known as the United Artists Theater, open for the general public to view motion pictures. When the appellant, Fox West Coast Agency Corporation, a corporation, answered the prior complaint, it omitted to say anything about the allegations of paragraph IV of said complaint. Said paragraph IV appears on page 93 of the transcript of record.

Aside from the contention of the appellant that pleadings in the prior action are not admissible as evidence, it is vigorously asserted that even though the complaint and answer in the prior action could, under any circumstances, be properly received in evidence for any purpose, the omission of the appellant to notice the allegations of paragraph 4 in said prior complaint is of no moment, for the reason that said paragraph does not allege that *any* of the defendants operated or maintained the United Artists Theater *as of the date of the accident,* to-wit: March 24, 1940. If it appeared that the Fox West Coast Agency Corporation, a corporation, was actually operating and maintaining the United Artists Theater as a business at the time the plaintiff filed her original action in the Su-

perior Court, such fact would not prove that at a prior time, to-wit: March 24, 1940, the same situation existed.

In view of the fact that the record shows the trial court attached the utmost importance to the evidence consisting of Plaintiff's Exhibits No. 6 and No. 7, the ruling admitting these pleadings was prejudicial error.

III.

The Trial Court Erred in the Admission of Evidence Consisting of Conversations Between One of the Appellant's Witnesses and an Officer of the Appellant, and Also in Receiving the Opinions and Conclusions of the Same Officer When He was Called as a Witness.

The argument now made is addressed to Specification of Error Number 2.

The mere fact that a person is an officer of a corporation does not make every utterance of such person an act of the corporation. The general rule is that the declarations of an officer of a corporation are not binding upon the corporation unless the declarations are made during the actual transaction of some business for and on behalf of the corporation. The declarations of an officer of a corporation in which such officer relates past events which may have occurred are not competent proof binding upon the corporation.

Section 1850 of the Code of Civil Procedure provides as follows:

> "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction."

Subdivision 5 of section 1870 of the Code of Civil Procedure provides as follows:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * *
>
> "5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, *within the scope of the* partnership or *agency,* and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party; * * *"

Subdivision 7 of section 1870 of the Code of Civil Procedure provides as follows:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * *
>
> "7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty; * * *"

The mere fact that a man has been an officer of a corporation for a period of one year does not mean that everything he says while sitting in his office is within the scope of his agency and during its existence. It is respectfully contended by the defendant, Fox West Coast Agency Corporation, a corporation, that the declaration of an agent, to be admissible in evidence as against the principal, must form part of a pending transaction between the principal and the person having the conversation with the agent.

The general rule with reference to declarations of agents is clearly set forth in Jones on Evidence, Civil Cases, Third Edition, sections 356 and 357, as follows:

> "Whatever an agent does in the lawful exercise of his authority is imputable to the principal and where the acts of the agent will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time, and constituting part of the transaction and declarations of this character are often classed in the decisions as *res gestae*. Thus in an action for purchase money, the false representations of the vendor's agent made during the negotiations may be shown. The same is true in an action for refusing to accept merchandise sold; the declarations of the agent of the defendant as to the quality of the goods, while weighing and receiving of them, are competent. In an action against a railroad company for ejecting a passenger from the car, the language of the employee while in the performance of the act is admissible. Where a corporation, such as a railroad or an insurance company, invests an agent with general authority to adjust claims against it, his declarations made while endeavoring to secure an adjustment of the claim are competent evidence against the principal. An agent who has charge of the construction of a building may bind his employer by his admissions explaining payments relating thereto. Other illustrations of statements admissible against the principal are those of the agent at the time of the sale of personal property, or at the time of a fire, to the effect that it was caused by his negligence. But, generally speaking, an agent's declarations, made subsequently to the transaction in question, are inadmissible against the principal, because in such case, they are no part of the *res gestae*, but are mere hearsay.

"It is of course an indispensable requisite to the admission of the declarations of an agent as part of the *res gestae* that such agency or authority be first proved. Such agency cannot be proved by the declarations themselves, no matter how publicly made; nor by such declarations accompanied by acts purporting to be in behalf of the principal unless they are brought to his knowledge. It is also a requisite to the admission of such declarations that they be made during the continuance of the agency, and in regard to a transaction still pending. Thus, a conversation between agents or employees of a railroad company concerning a past transaction is clearly incompetent as evidence against the company; and the declarations of the president of a corporation relative to its ownership or as to its former dealings with other parties, which are not shown to have been made while in the performance of his duties as such officer or while doing business contemporaneously with the declarations, are not binding on the company.

"Declarations by Agents of Corporation.—This subject is frequently illustrated in the case of declarations of agents and employees of corporations and other defendants in actions for negligence. Thus, the declarations of an employee or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty; and that his declaration did not accompany the act from which the injuries arose and was not explanatory of anything in which he was then engaged, but that it was a mere narration of a past occurrence.

"However, as we have already pointed out, there is a class of cases in which the rule that the declaration must be contemporaneous with the act, is construed less strictly; and in which such declarations are admitted, although not technically contemporaneous, if they are spontaneous and tend to explain the transaction, and if so slight an interval of time has elapsed as to render premeditation improbable. Accordingly in numerous cases the declarations of employees and agents, made soon after an accident, have been received as part of the *res gestae*.

"The transaction may be of such a character as to extend through a considerable period of time; and in such cases the declarations of the agent in reference to the business, if within the scope of his authority, may be received, provided they are made before such transaction is completed. Thus, a letter or other statement of an officer of a corporation respecting a transaction which forms the subject of the controversy is admissible in an action against the corporation, if made while the transaction is in progress. The declarations of a baggage-master in answer to inquiries after lost baggage, and the statements of an insurance agent during a controversy about the renewal of insurance, to the effect that he delivered a certificate of renewal, are admissible on the same ground. Although most of the illustrations given above relate to the declarations of agents of corporations, it need hardly be added that the same general principles govern as in the case of the agents of individuals. To bind the principal, the declarations must be within the agent's authority and must accompany an act which he is authorized to do."

There was no transaction pending between the plaintiff and the Fox West Coast Agency Corporation, a corpora-

tion, at any of the times when Mr. Rountree was talking to Mr. Bertero. Mr. Rountree was endeavoring to ascertain the relationship, if any, of the Fox West Coast Agency Corporation, a corporation, to the maintenance and operation of the seats in the United Artists Downtown Theater as of the date of the accident. Mr. Rountree was merely acting as an agent of the plaintiff in making an investigation and it is quite obvious that the defendant corporation was not, through Mr. Bertero, or otherwise, engaging in any transaction with the plaintiff.

If there ever had been a transaction between the plaintiff and the Fox West Coast Agency Corporation, a corporation, such transaction terminated on the day of the accident. The accident was not a transaction and the litigation which ensued thereafter is not a transaction. At the time of the conversation referred to by Mr. Rountree, the record will show that the Fox West Coast Agency Corporation, a corporation, was represented by counsel of record in the litigation. There is no evidence showing that the Fox West Coast Agency Corporation, a corporation, authorized Mr. Bertero to have any conversation whatever with Mr. Rountree, especially in the absence of counsel for the Fox West Coast Agency Corporation, a corporation. The mere fact that Mr. Bertero talked to Mr. Rountree does not show that the Fox West Coast Agency Corporation, a corporation, authorized him to do so or had any knowledge of the fact that he was doing so.

In so far as the declarations of Mr. Bertero or his testimony in court tended to vary the provisions of the written contract between the Fox West Coast Agency Corporation, a corporation, and the proprietors of the United Artists Downtown Theater, such declarations and his testimony are and each thereof is not competent proof.

IV.

The Conclusion of Law That Plaintiff Should Have and Recover Judgment in the Sum of Twenty-five Hundred ($2500.00) Dollars Is Not Supported by the Findings of Fact With Reference to the Special Defenses of Contributory Negligence and Assumption of Risk; and the Findings That Appellee Was Not Negligent or Careless Are Not Supported by the Evidence.

The trial court in effect found that each and every act alleged by the defendant to have been committed by the plaintiff was done by her, and that she omitted the doing of everything, the omission of which was alleged in the answer.

The trial court merely found that the plaintiff did not negligently and carelessly do or omit the matters alleged.

In the case of *Mardesich v. C. J. Hendry Co.*, 51 A. C. A. 782 (not yet reported in bound volumes), a California District Court of Appeal reversed a judgment in favor of a plaintiff in a personal injury action because of the fact that the findings were made in the form of negatives pregnant. The court said with reference to similar findings:

> "Even if we could construe the words as being synonymous the finding would only deny the adjectives and would still imply that the acts specified were done; *i. e.*, that plaintiff failed to maintain his balance while going down the ladder; that he failed to place his feet firmly upon the rungs of the ladder;

> that he failed to maintain his weight in relation to the slant of the ladder so that the ladder would not slip or slide from the place where it rested on the floor; that he permitted his feet or one of his feet to slip off the ladder; that he failed to maintain proper balance; that he fell or jumped from the ladder. From such probative facts it would follow as a matter of law that plaintiff was guilty of negligence proximately contributing to his injury."

In the case at bar if we ignore the adjectives "negligently" and "carelessly" in the findings set forth in paragraph IX [Tr. pp. 143-145], there are findings of probative facts which necessarily result in the conclusion that the plaintiff was guilty of contributory negligence. Therefore, the findings do not support the conclusions of law that the plaintiff is entitled to a judgment against the appellant.

In addition to the foregoing comments the appellant contends that if this Honorable Court should hold that Plaintiff's Exhibits 6 and 7 were properly admitted in evidence, then all of the allegations contained in the special defenses set forth in Plaintiff's Exhibit 7 are true, for the reason that plaintiff offered no evidence contradicting the allegations "That on or about the 24th day of March, 1940, the plaintiff so negligently, carelessly and recklessly conducted herself while in the United Artists Theater in the City of Los Angeles, California, immediately prior to and at the time she seated herself in a certain seat in said theater, that any injury or damage

sustained by plaintiff was a proximate result of said negligence, carelessness and recklessness on her part; and that the plaintiff was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew or should have known that seats in theatres and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theater was designed for the purpose of accommodating a person of the grossly excessive weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in defendant's theatre in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff." [Tr. pp. 98-99.]

The testimony of defendant's witness Cheney, hereinbefore set forth, is conclusive proof of the fact that the plaintiff misused the seat and broke the metal parts thereof by subjecting said metal parts to extraordinary stress and strain, which such parts were not designed or intended to withstand.

It is respectfully submitted that the findings upon the subject of contributory negligence do not support the conclusions of law and that the said findings are contrary to the evidence in the case.

Conclusion.

Appellant respectfully submits that the judgment of the District Court should be reversed.

Dated: Los Angeles, California, July 29, 1942.

LASHER B. GALLAGHER,

Attorney for Appellant, Fox West Coast Agency Corporation, a Corporation.

APPENDIX.

PLAINTIFF'S EXHIBIT NO. 5.

"This Agreement made and entered into this 20th day of September, 1937, by and between Fox West Coast Theatres Corporation, a Delaware corporation (hereinafter referred to as 'West Coast'), Grauman's Greater Hollywood Theater, Inc., a California corporation (hereinafter referred to as 'Grauman's Greater Hollywood'), United West Coast Theatres Corporation, a California corporation (hereinafter referred to as 'United West Coast'), United Artists Theatre Circuit, Inc., a Maryland Circuit'), United Artists Theatres of California, Ltd., a California corporation (hereinafter referred to as 'United Artists'), Fox West Coast Agency Corporation, a Delaware corporation (hereinafter referred to as 'Agency'), and United Artists Theatre Corporation of Los Angeles, a California corporation (hereinafter referred to as 'Los Angeles United Artists') [13]

Witnesseth:

Whereas, West Coast is the sublessee of the Loew's State Theatre, Los Angeles, California, for a term ending at the close of business on August 31, 1945; Grauman's Greater Hollywood is the ground lessee of the Grauman's Chinese Theatre in Hollywood, California, for a term ending at the close of business on January 31, 2023; United West Coast is the sublessee of the Four Star Theatre located near the corner of Wilshire Boulevard and Mansfield Avenue, Los Angeles, California, for a term ending at the close of business on December 31, 1938, and which term will be extended so that it will expire on March 31, 1947; Los Angeles United Artists is the lessee

of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on December 31, 1957; and United Artists is the sublessee of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on March 31, 1947; and

Whereas, West Coast is the owner of thirty-three and one-third per cent. (33⅓%) of the outstanding capital stock of Grauman's Greater Hollywood and is also the owner of all the outstanding Class 'A' stock of United West Coast; and

Whereas, United Artists Circuit is the owner, directly or indirectly, of sixty-six and two-thirds per cent. (66⅔%) of the outstanding capital stock of Grauman's Greater Hollywood, is the owner of all of the outstanding capital stock of Los Angeles United Artists and is the owner of all of the outstanding stock of United Artists which owns all of the outstanding Class 'B' stock of United West Coast; and

Whereas, the parties hereto desire to consolidate the operation of the theatres above referred to under the sole management and direction of Agency: [14]

Now, Therefore, This Agreement Witnesseth:

That in consideration of the premises and of the sum of One Dollar ($1.00) lawful money of the United States of America by each party to the other in hand paid, receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is hereby covenated and agreed by and between the parties hereto, each in respect of its own covenants and agreements, and

not in respect of the covenants and agreements of any of the others, as follows:

1. Grauman's Greater Hollywood, United West Coast, Los Angeles United Artists and United Artists, and West Coast, respectively, hereby surrender to and vest in Agency the management of the Chinese, Four Star, United Artists Downtown and Loew's State theatres (said four theatres being hereinafter sometimes collectively referred to as 'the theatres'), but excluding any so-called commercial or non-theatre portion, if any, of the theatres or of the buildings in which they are located. All furniture, fixtures, equipment and personal property located in the theatres and used or useful in the operation thereof, shall remain in the theatres subject to the control of Agency. Agency shall manage and operate the theatres for the joint benefit of the parties hereto, and as such manager or operator shall have, among other things, the sole right and authority, and obligation as agent for the other parties hereto, (a) to select, purchase, license, lease and/or book motion pictures to be exhibited in the theatres; (b) to employ the personnel which in the opinion of Agency may be necessary for the successful operation of the theatres, including a local manager for each of the theatres and one 'district manager' for all of the theatres; and (c) to keep all books of accounts and records pertaining to the operation of the theatres. Agency from time to time may change the respective operating policies of the theatres or of any one or more of them to include or exclude stage shows or other similar attractions, provided the written [15] consents of West Coast and United Artists Circuit shall have first been obtained, and in the event that the operating policy of any theatre is so changed, Agency

shall have the sole right and authority and obligation as agent for the other parties hereto, to select, procure, purchase, license, lease and/or book such stage shows or other attractions for exhibition in such theatre. Agency may also from time to time close and thereafter re-open any of the theatres provided the written consents of West Coast and United Artists Circuit shall have first been obtained and in such event the parties hereto shall use their best efforts to dispose of any motion pictures purchased, licensed and/or leased for exhibition in such theatre or theatres during the period that the same may be closed, if such motion pictures are not needed in connection with the operation of any of the other theatres, and the gain or loss resulting from such disposition of motion pictures shall be credited or charged, as the case may be, as operating income or expense.

2. For its services hereunder, Agency shall receive an amount equal to five and one-quarter per cent (5¼%) of the gross income of the theatres, which amount shall be paid to it as hereinafter in subdivision (a) of Section 3 provided. For the purposes of this agreement the term 'gross income' shall mean the sum of the gross theatre box office receipts, and all other receipts of whatsoever nature derived from the operation of the theatres, less the amount of theatre admission taxes imposed by any governmental authority having jurisdiction. The term 'gross income' shall not include any booking fees or agency charges based on and deducted from the salary of any performers in the theatres, or any of them, and it is understood and agreed that Agency, or any corporation subsidiary to or affiliated with it, may charge and retain such amounts from performers' salaries without accounting therefor to any of the parties hereto.

3. During the term of this agreement, Agency shall collect the [16] gross income of the theatres, and shall deposit the same in a separate bank account (hereinafter referred to as the 'Operating Account'), it being expressly understood and agreed that all funds in the Operating Account shall be held in trust for the joint benefit of West Coast and United Artists Circuit. From the funds so deposited, but only from such funds and not otherwise, Agency shall be obligated to pay the following:

(a) First, to Agency on Monday of each week an amount equal to five and one-quarter per cent. (5¼%) of the gross income of the theatres (hereinabove in Paragraph 2 defined) during the preceding week, commencing July 1, 1937; it being understood and agreed that the payments to Agency shall be an amount equal to three per cent. (3%) of such gross income for all periods prior to July 1, 1937.

(b) Second, on the first day of each month, commencing April 1, 1937:

To United West Coast Nine Hundred Twenty-three Dollars and Twenty-five Cents ($923.25) as rental for the Four Star Theatre;

To Grauman's Greater Hollywood Seven Thousand Two Hundred Ninety-one Dollars and Sixty-seven Cents ($7,291.67) as rental for the Chinese Theatre;

To West Coast Thirteen Thousand Four Hundred Eighty-six Dollars and Eleven Cents ($13,486.11) as rental for the Loew's State Theatre;

To United Artists Six Thousand Five Hundred Dollars ($6,500.00) as rental for the United Artists Downtown Theatre.

(c) Third, all other operating expenses of the theatres, as and when the same shall be due. The term 'operating expenses' shall have the meaning ordinary attributed to it in proper accounting practice applicable to the motion picture theatre business, and shall include, without limiting the generality of the foregoing (and in addition to [17] the expenses referred to above in subdivisions (a) and (b) of this Section 3), film rentals, cost of stage shows and other attractions, if any, service charges and rent on sound equipment, charges for heat, water, gas, light and power, salaries and wages of persons employed in the operation of the theatres, including, without limitation, a local manager for each of the theatres and one district manager for all of the theatres (provided that the duties of said district manager shall be limited to the supervision, under the direction of Agency, of the management and operation of the theatres), social security taxes paid by the employer, cost of advertising, minor repairs, audits by independent certified public accountants, and premiums on public liability insurance, but shall specifically exclude allowances for depreciation and obsolescence and (except in the case of the Four Star Theatre) taxes and assessments and premiums on fire insurance. With respect to the Four Star Theatre there shall be included in the 'operating expenses' and paid to United West Coast from the operating account, such taxes and assessments and such premiums on fire insurance covering the building and equipment as the sublessee is required to pay with respect to such theatre under the present sublease (and under any renewals or extensions thereof) between United Artists, as sublessor, and United West Coast, as sublessee, as and when such taxes and assessments and insurance premium shall be due and payable by United West

Coast. Taxes and assessments upon, and premiums on fire and earthquake insurance, if any, covering each of the theatres (except the Four Star Theatre) shall be paid by the party holding said theatre under lease or sublease as in the first preamble of these presents set forth.

(d) Fourth, expenditures deemed by Agency in its sole discretion necessary in the operation of the theatres, or any one or more of them, other than 'operating expenses', as such term is herein defined and other than services specifically excluded from the definition of 'operating expenses', hereinabove set forth, provided, [18] however, that the aggregate amount of such expenditures shall not exceed One Thousand Dollars ($1,000.00) for any one theatre during any period of six (6) consecutive months without the written consent of West Coast and United Artists Circuit having first been obtained.

Except as provided in this subdivision (d) of this section no expense can be charged against any party without its consent for repairs, renewals or equipment to a theatre or theatres held by such party, and except as provided in this subdivision (d), no expenditures from the Operating Account for purposes other than those included in subdivisions (a), (b) and (c) of this section may be made without the written consent of West Coast and United Artists Circuit.

(e) The balance of gross income, if any, remaining after the payment, or provision for payment, all in accordance with proper accounting practice applicable to the motion picture threatre business, of the items listed in subdivisions (a), (b), (c) and (d) of this Section 3, shall be termed 'net profits', and such net profits shall be distributed by Agency within twenty (20) days after the

close of the next current fiscal accounting quarter, and quarter-annually thereafter (or on such other dates and for such other periods as may be mutually agreed upon in writing by West Coast and United Artists Circuit) one-half thereof to West Coast and one-half thereof to United Artists Circuit.

4. In the event that during the period of this agreement United West Coast, as the sublessee of the Four Star Theatre, or Grauman's Greater Hollywood, as the ground lessee of the Chinese Theatre, or West Coast, as the sublessee of Loew's State Theatre, shall obtain a reduction in the rental payable by it under the terms of its lease or sublease, the amount payable hereunder as rental for any such theatre shall be reduced for the period and in the amount of such rent reduction.

In the event that during the period of this agreement the total rent paid for the United Artists Downtown Theatre by Los Angeles [19] United Artists to Ninth and Broadway Building Co., or to its successors or assigns as lessor, shall be diminished or reduced to an amount less than Six Thousand Five Hundred Dollars ($6,500.00) per month, whether by agreement or otherwise, the amount payable hereunder to United Artists as rental for said threatre, shall be reduced for the period and in the amount of such rent reduction.

5. Prior to the execution of this agreement, West Coast and United Artists Circuit have each deposited in the Operating Account hereinabove referred to, the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) to be employed in the operation of the theatres. The funds so deposited in the Operating Account may be used in the making of any of the payments referred to in

subdivisions (a), (b) and (c) of Section 3 and, to the extent herein provided, in the making of any of the payments referred to in subdivision (d) of Section 3. If at any time during the term of this agreement, the Operating Account shall be depleted below the sum of Twenty-five Thousand Dollars ($25,000.00) Agency shall forthwith notify West Coast and United Artists Circuit of such fact and of the amount of such depletion, and within twenty (20) days after the giving of such notice, West Coast and United Artists Circuit shall each pay to Agency for deposit in the Operating Account fifty per cent. (50%) of the amount required to restore the amount on deposit in the Operating Account to the sum of Twenty-five Thousand Dollars ($25,000.00), it being the intention that fifty per cent. (50%) of the losses, if any, incurred in the operation of the theatres, shall be borne by United Artists Circuit and fifty per cent. (50%) by West Coast.

6. During the term of this agreement, Agency as agent for the parties hereto, shall effect and maintain in full force and effect public liability insurance covering each of the theatres and the appurtenances thereto in the amount of Fifty Thousand Dollars ($50,000.00) covering injuries to one person in any one accident and in the amount of Five Hundred Thousand Dollars ($500,000.00) [20] covering injuries to more than one person in any one accident, such insurance to be for the benefit of Agency and the particular party hereto holding under lease or sublease the theatre covered by insurance as their interests may appear. Agency shall be obligated to pay from the Operating Account, but not otherwise, the premiums payable upon such public liability

insurance as and when such premiums shall be payable under the terms of said contracts of insurance. Anything hereinabove to the contrary notwithstanding, it is expressly understood and agreed (and the mutual obligation of West Coast and United Artists Circuit to bear fifty per cent. (50%) of the losses as above provided is expressly limited hereby) that the amount of any liabilities arising out of any accident or accidents to persons or property in excess of the amount of all public liability insurance available for the satisfaction of such liabilities, shall be borne and discharged solely by the particular party holding, under lease or sublease as in the first preamble of these presents set forth, the particular theatre in which such accident or accidents shall have occurred.

7. Within ten (10) days after the termination of this agreement, the amount, if any, remaining in the Operating Account after payment, or provision for payment, of all payments provided for in subdivisions (a), (b), (c) and (d) of Section 3 hereof shall be distributed to West Coast and United Artists Circuit, fifty per cent. (50%) to each (or as their respective interests may appear in the event of the failure of either of said parties to make any payment or payments required to be made hereunder.)

8. It is understood and agreed that the provisions of this agreement become effective as of April 1, 1937, unless otherwise provided herein, and that the term of this agreement is from April 1, 1937 to March 31, 1947.

9. It is understood and agreed that this agreement may not be assigned by any of the parties hereto without the written consent [21] of all of the other parties, provided, however, that Agency may assign all of its rights, powers and privileges under this agreement to any cor-

poration subsidiary to West Coast and organized and equipped to perform similar services, upon condition that such assignee shall assume and agree to perform all the obligations of Agency hereunder, and upon such assignment and assumption Agency shall be relieved from any further liability under this contract except, with respect to all the period prior to such assignment, to account for the gross income and the Operating Account. The term 'subsidiary' or 'subsidiary company' whenever used in this section means any corporation fifty per cent. (50%) or more of the outstanding capital stock of which having voting power is at the time owned by West Coast, or any parent company of West Coast, either directly or through one or more intermediaries.

10. If at any time or times during the term of this agreement one of the theatres shall be destroyed or damaged to an extent rendering it unfit for use as a motion picture theatre, by fire, earthquake or other casualty, the monthly sum required to be paid on account of the rental for such theatre under the provisions of subdivision (b) of Section 3, shall not be required to be paid from and after the date of such destruction or damage; provided, however, that if such theatre shall be restored to its former condition during the term of this agreement, such monthly payments shall re-commence as of the date such restoration is completed. The destruction of or any damage to any of the theatres (if less than all of the theatres) shall not otherwise affect this agreement or the obligations of the parties hereunder.

11. During the term of this agreement Agency shall render to West Coast and United Artists Circuit:

(a) Daily statements of box office receipts of each of the theatres.

(b) Weekly statments showing receipts, disbursements [22] and expenses of and for each of the theatres for the preceding week.

(c) Annual profit and loss statements with respect to the operations of the theatres, duly certified by a reputable firm of Certified Public Accountants.

(d) Such other information with respect to the operation of the theatres as may reasonably be required by West Coast or United Artists Circuit.

It is understood and agreed that the dates of the rendering of the weekly and annual statements referred to in (b) and (c) above, and the particular weekly or annual periods respectively covered thereby, may correspond with the dates and periods of similar weekly and annual statements prepared by Agency in the usual course of its business for other theatres managed or supervised by it, appropriate adjustments being made to cover any portion of a week or of a year which may be unaccounted for by reason of the relation of such dates and periods to dates of the commencement and termination of this agreement.

12. The parties hereto acknowledge that the theatres referred to in this agreement have, since on or about November 14, 1934, been operated substantially in accordance with the provisions of this agreement except that the rentals paid for the various theatres have not been the rentals provided to be paid under the terms hereof. In this connection all the parties hereto acknowledge and agree:

First: That all rentals to be paid up to and including March 31, 1937 have been paid and that no party is entitled to any rentals on account of any period prior to April 1, 1937.

Second: That after the deduction of the rentals heretofore paid, and charges and expenses computed in accordance with the provisions of this agreement, [23] and particularly Section 3 hereof (except that the deduction representing the charges for the service of Agency as set forth in Section 3 (a) hereof shall be an amount equal to three per cent. (3%) of the gross income of the theatres up to and including June 30, 1937), West Coast and United Artists Circuit are each entitled to one-half of the net profits arising from the operation of such theatres and all of them from November 14, 1934, to April 1, 1937.

Third: In an event any dispute should arise between any of the parties hereto relating to any matter or thing in connection with the operation of the theatres or any of them since November 14, 1934, the provisions of this agreement shall be determinative and shall apply to such matter or thing with the same force and to the same extent as though this agreement had then been in operation.

13. In the event that at any time during the term of this agreement the Four Star Theatre shall not be used for the purpose of exhibiting first-run motion picture productions, said Four Star Theatre may, at the election of West Coast, and upon ten (10) days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation of this agreement. After the effective date of such notice the operations of said Four Star Theatre shall revert to United West Coast; provided, however, that if thereafter at any time or from time to time said Four Star Theatre shall be used for the exhibition of first-run motion picture productions, the op-

eration of such theatre may, at the election of United Artists Circuit, upon ten (10) days notice in writing to West Coast and United West Coast, be reincluded in this agreement during such period or periods as said theatre shall so be used, and may similarly from [24] time to time at the election of West Coast, upon ten days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation hereof during such period or periods as it shall not be so used.

14. United Artists and United West Coast agree that prior to the expiration of the term of the sublease of the Four Star Theatre from United Artists to United West Coast, said sublease will be extended on the same terms and conditions as are now contained therein (provided, however, that such terms and conditions may be modified or changed in accordance with any modifications or changes made of or in a certain agreement between West Coast and United Artists, dated September 1, 1933) so that it will expire March 31, 1947.

15. Reference is hereby made to that certain agreement executed in duplicate at Los Angeles, California, the first day of September, 1933, by and between said Fox West Coast Theatres Corporation, therein referred to as 'Fox' and said United Artists Theatres of California, Ltd., therein referred to as 'United'. Anything herein to the contrary notwithstanding, this agreement may be terminated and declared to be of no further force or effect whatsoever at the option of either West Coast or United Artists Circuit upon any termination of said agreement

dated September 1, 1933, or any extension or renewal thereof. Such option shall be exercised prior to the expiration of thirty (30) days from and after any termination of said agreement dated September 1, 1933, by notice in writing served upon all the other parties hereto. Said written notice shall specify the date upon which this agreement shall terminate, which termination date shall be not more than thirty (30) days from and after the date of such notice.

16. Nothing herein is intended or shall be construed so as to create a partnership between or among the parties hereto, or to make any of the parties hereto a partner of any other or all of the remaining parties hereto. [25]

17. All notices, orders or demands of any kind which any party hereto may be required or may desire to serve on any other party hereto under the terms of this agreement may be served (as an alternative to personal service or delivery to such party) by mailing the same by registered United States mail, addressed as follows:

To Fox West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To Grauman's Greater Hollywood Theater, Inc., at 1501 Broadway, New York, New York.

To United West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Circuit, Inc., at 1501 Broadway, New York, N. Y.

To United Artists Theatres of California, Ltd., at 1609 West Washington Boulevard, Los Angeles, California.

To Fox West Coast Agency Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Corporation of Los Angeles at 1501 Broadway, New York, New York,

or such other place as the parties hereto may designate from time to time in writing. Service shall be deemed complete within seven (7) days after such mailing.

18. This agreement is made solely for the benefit of the parties hereto and shall not be construed to render Agency liable to any person, firm or corporation other than the parties hereto, nor to render Agency liable for the payments referred to in subdivisions (b) or (c) and (d) of Section 3 hereof, except as in said Section 3 provided, and except for the obligation of Agency to account for the gross income and the Operating Account. [26]

In Witness Whereof, the parties hereto have subscribed their respective corporate names and affixed their respective corporate seals by their officers thereunto duly authorized, all as of the day and year first above named.

(Seal) Fox West Coast Theatres Corporation,

By W. C. Nickel
Vice President

Attest:

John P. Edmundson
Asst. Secretary

GRAUMAN'S GREATER HOLLYWOOD THEATRE, INC.,

By JOSEPH M. SCHENCK
President

Attest:

T. J. HEALY
Secretary

UNITED WEST COAST THEATRES CORPORATION,

By CHARLES P. SKOURAS
President

Attest:

ALBERT W. LEEDS
Secretary

UNITED ARTISTS THEATRE CIRCUIT, INC.,

By WM. P. PHILIPS
Vice-President

Attest:

BERTRAM S. NAYFACK
Secretary

(Seal) UNITED ARTISTS THEATRES OF CALIFORNIA LTD.,

By JOSEPH M. SCHENCK
President

Attest:

LOU ANGER
Secretary

(Seal) Fox West Coast Agency Corporation,

By Charles P. Skouras
President.

Attest:

Albert W. Leeds
Secretary [27]

(Seal) United Artists Theatre Corporation of Los Angeles,

By Joseph M. Schenck
President

Attest:

Bertram S. Nayfack
Secretary

No. 10169

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FOX WEST COAST AGENCY, a corporation

Appellant,

vs.

JEAN L. FORSYTHE

Appellee.

BRIEF FOR APPELLEE, JEAN L. FORSYTHE

ROSECRANS & EMME and
BAYARD R. ROUNTREE,
815 Black Building, Los Angeles,
Attorneys for Appellee.

Parker & Baird Company, Law Printers, Los Angeles

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TABLE OF AUTHORITIES CITED.

CASES. PAGE

No. 10169

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BRIEF FOR APPELLEE, JEAN L. FORSYTHE

Review of Appellant's Brief

Appellant's opening brief sets forth seven specifications of error, which are not followed in sequence in the argument.

Specifications 3, 4, and 5 are argued under one heading in the first point set out in the argument, then specifications 1 and 2 are discussed separately and in order, and finally specifications 6 and 7 are treated under one heading.

In this brief we will discuss the specifications of error and the argument with reference thereto in the same order appellant has adopted in that part of the opening brief devoted to the argument. However, some comment should first be made with reference to the statement of the case set out on page 6 of the brief.

In the opening portion of this statement, it is implied but not said, that the Fox West Coast Theaters Corporation and the United Artists Theater Circuit Inc., doing business as Fox U.A. Venture, were operating the theater. Throughout the brief this name "Fox U.A. Venture" is emphasized. Actually appellant corporation was operating the theater as agent for the Fox West Coast Theater corporation and the United Artists Theaters Circuit, Inc., the name Fox U.A. Venture being merely a bookkeeping device which we will show conclusively in the argument.

The appellant was in full control of the employees working in the theater and paid them from a bank account resulting from the income of the theater and its disposition was controlled by written contract between the three named corporations, as well as certain others, which contract was introduced in evidence as plaintiff's Exhibit No. 5, a full copy of which is set forth as an appendix to the opening brief.

I.

The Evidence Is Sufficient to Support the Findings and the Judgment

1. As to the Relations Between the Parties

Appellant states that the only evidence with reference to the relation of the parties, other than certain testimony to which objection was made, was the written contract introduced as plaintiff's Exhibit No. 5, and then endeavors in the argument to show this was insufficient.

Before discussing this contract it should be pointed out that appellant made no attempt whatsoever to prove that this contract had been modified or abrogated by the parties, or that appellant had been discharged or absolved of its duties thereunder.

In view of these circumstances it is submitted that the contract is conclusive proof that appellant was actually operating the theater and in full control thereof, and consequently responsible for any negligence arising from such operation. First, it is not questioned that the Fox West Coast Theatres Corporation and the United Artists Theatre Circuit, Inc., were the principal and interested parties in this theater and entitled to the proceeds from its operation, or to control the operation of the theater at the time the contract was executed. Let us then examine the contract in detail insofar as appellant's rights and duties or the manner of the operation of the theater are concerned. We are not particularly concerned with the opening recitals of the agreement which set forth the interest of the various parties signatory thereto. In the very opening of the first numbered paragraph of the agreement we find this language:

> "Grauman's Greater Hollywood, United West Coast, Los Angeles United Artists and United Ar-

> tists, and West Coast, respectively, *hereby surrender to and vest in Agency* the management of the * * * United Artists Downtown * * * . All furniture, fixtures, equipment and personal property located in the theatres and used or useful in the operation thereof, shall remain in the theatres subject to the control of Agency." [Appendix. p. 3, Tr. p. 21.] (Emphasis ours.)

It might be noted that in the recitals of the agreement, it is stated that the appellant corporation will be thereinafter designated as "Agency." Other duties and responsibilities of appellant are then set out and briefly stated are:

(1) To manage and operate the theater;

(2) The sole right as agent to select and contract for moving pictures;

(3) To employ the personnel of the theater;

(4) To keep all books of account;

(5) To collect, deposit and distribute the funds;

(6) To change the operating policies to include stage shows, etc., first obtaining written consent;

(7) Sole right, authority, and obligation in the event of such change of policy, to select book, etc., such stage shows or other attractions;

(8) Right to close and thereafter re-open the theater with the written consent of the parties.

Paragraph 2 provides that the appellant should receive five and one-quarter per cent (5¼%) of the gross income of the theater for its services. [Tr. p. 22.]

Paragraph 3 provides the method of handling all funds resulting from the operation of the United Artists and the other theaters involved, providing that such income should be deposited in a separate bank account and held in trust by the agency. Appellant was authorized and obligated to disburse such funds in the trust account as follows: [Tr. p. 23.]

(1) To pay to itself 5¼% of the gross income payable weekly;

(2) Rentals;

(3) All operating expenses, including, among other things, salaries of persons employed in the operation of the theaters, social security taxes, and minor repairs.

(4) Expenditures deemed by appellant, in its sole discretion, necessary in the operation of the theatres, or any one of them, other than operating expenses; providing that such expenditures should not exceed the sum of $1000 during any six months' period, without the written consent of the Fox West Coast Theater Corporation, and the United Artists Theater Circuit Inc., and finally the balance to be divided equally between the two principal corporations.

Paragraph 4 [Tr. p. 27] has no bearing on the present question.

Paragraph 5 [Tr. p. 28] provides that the Operating Account is to be commenced with a deposit of $25,000.00 contributed to in equal amounts by the principal corporations and that in the event it fell below said sum they should contribute equally a sufficient amount to bring the fund up to the initial amount.

In Paragraph 6 [Tr. p. 29] it is provided that appellant be required to maintain public liability insurance;

Paragraph 7 [Tr. p. 30] deals with the distribution of funds upon the termination;

Paragraph 8 [Tr. p. 31] the term of the agreement to be from April 1, 1937 to March 31, 1947.

Paragraph 9 [Tr. p. 31] it is provided that Agency may assign its rights, etc., to any corporation subsidiary to the Fox West Coast Theatres Corporation;

Paragraph 10 [Tr. p. 32] the effect on the agreement in the event the theater should be destroyed or damaged by fire, etc.

Paragraph 11 [Tr. p. 32] provides that appellant should render to the principal corporations daily statements of box office receipts, weekly statements of receipts, disbursements and expenses, annual profit and loss statements, and such other information as might be requested. The balance of the contract having no bearing upon any question involved in this litigation, we will not take the space to analyze the same.

The only attempt to show that any different situation was in effect at the time of the accident, other than that described in the contract, related to the question of the payment of the employees and this evidence established that the employees were paid from a bank account known as "The United Artists Contingent Fund."

Mr. Bertero testified: [Tr. pp. 78, 79]

> "After the 5.25 per cent of the gross income of the United Artists Theater at 933 South Broadway was deducted, and the payment of salaries of employees in that theater, including the manager of that

theater, were deducted, the balance of that money went into a separate bank account, and ultimately what we call distributions of the Venture were distributed to the two parties to the Venture; that is, the Fox West Coast Theatres Corporation and the United Artists Theatre Circuit, Inc."

Mr. Henry L. Wallace, Asst. Manager of the United Artists Theater, testified: [Tr. p. 110].

"Q. By Mr. Gallagher: Do that. A. I received my check at a certain time in the week from the United Artists Theatre, and that is the only check I ever received as long as I worked at the United Artists Theatre.

Q. That is, you received checks which were signed 'United Artists Theatre, Contingent Fund, by ————————'. A. By the management.

Q. Two names? A. Two signatures, Tom Sorerio and Jordan Sergeant.

Q. Did you sign any checks yourself? A. No, sir.

Q. By the Court: Who employed you? A. By the management; Tom Sorerio.

Q. The manager of what? A. Of the United Artists Theatre."

Payroll records and social security records were produced to show that such records were kept under the name "Fox U.A. Venture" and it is upon this evidence that great stress is made to establish that the people working in the theater were not under the control of appellant.

Mr. Bertero testified on this question, first: that the name "Fox U.A. Venture" was a bookkeeping title set up to economically describe the arrangement so far as accounting and other methods were concerned under plaintiff's exhibit 5. (The contract hereinbefore analyzed) [Tr. p. 78]. The managers were appointed by Mr. Skouras, President of the Fox West Coast Agency Corporation, and also President of the Fox West Coast Theater Corporation. Mr. Bertero testified further that the proceeds from the theater were deposited in the account known as the United Artists Theater Contingent Fund [Tr. p. 88], and from this fund certain expenses are paid by the theater manager. The balance remaining is transferred to an account entitled "Fox U.A. Venture Fund" in the Washington and Vermont Branch of the Bank of America. Certain other expenses are paid out of that account and at certain periods distributions are made to the Fox West Coast Agency and the Fox West Coast Theater and United Artists Theater Circuit, Inc. [Tr. p. 89].

From the foregoing it clearly appears that this method of keeping the payroll records of employees and handling the disposition of funds was strictly in compliance with paragraph 3 of the contract. No evidence was offered whatsoever to show that the employees were not, in fact, under the direct control of Appellant.

It must now appear that the effort of Appellant to place responsibility on the so-called Fox U. A. Venture is nothing more or less than an effort to confuse the issue when in fact Appellant is solely responsible for the operation of the theater.

2. The Evidence Supports the Finding of the Payment By Plaintiff of an Admission Fee to Appellant.

In our preceding argument we demonstrated that appellant was in fact operating the theater on March 24, 1940. Consequently there can be no question concerning the fact that plaintiff did pay the price of the ticket to the appellant. Moreover, appellant received 5¼% of the sum so paid by plaintiff. We submit that there is no merit in appellant's fourth specification of error.

3. The Finding of Negligence on the Part of Appellant is Supported by the Evidence.

It appearing without contradiction as we have previously shown, that appellant was in sole and complete control of the theater and the equipment thereof, it follows that plaintiff was entitled to the benefit of the doctrine of *res ipsa loquitur,* if that doctrine is otherwise applicable. That it is applicable does not seem open to argument as certainly theater seats do not ordinarily collapse when put to their intended use. Upon the trial appellant offered evidence in an endeavor to show that the collapse of the seat was not the result of negligence on its part. However, they failed in their endeavor for the evidence actually tended to show negligence upon its part.

Mr. Wallace, assistant manager of the United Artists Downtown theater, was called by the defendant and in his testimony described his examination of the seats in the lower half of the center section of the theater on the day in question. [Tr. p. 111]. This inspection consisted of walking through the aisles rapidly raising and lowering

each seat by hand as he went. [Tr. p. 114]. This motion was demonstrated to the trial court by the witness, Mr. Arroyo, another defense witness and a janitor employed by appellant, testified that he cleaned under the seats every night and if the seats were down he raised them. No work was done in cleaning the seat itself, or any inspection made. [Tr. p. 124].

Mr. Cudd stated that in his work as a janitor, he cleaned out between the seats and underneath the seats, raised the seats and left them until the next day. [Tr. p. 139]. It may be rather difficult, reading from the cold record, to determine how cursory and ineffectual was this inspection. It should be kept in mind that the trial court had these witnesses before it and had the benefit of observing the demonstration of their acts. Even so we submit that the testimony does not establish any actual inspection or examination of the working parts of the seat in the theater at all.

With reference to the actual cause of the collapse, appellant called Mr. Cheney, an expert metallurgist, who testified in his opinion, the seat collapsed because it was submitted to a greater load than the metal was designed to withstand. [Tr. p. 128]. It is to be remembered that appellee was at the time of the accident a woman weighing 285 pounds. Appellant accepted her admission fee with full knowledge of her size, as it was obvious. No warning of any kind was given her by appellant of any danger to herself arising from the inability of the seats in the theater to stand her weight.

If it is to be concluded from the evidence that plaintiff was too heavy for the seat, then appellant bore the duty of warning her of the danger and failure to do so constituted negligence.

The trial court, having determined the issue of negligence against appellant, on sufficient evidence, the specification of error was without merit.

4. Appellant as the Agent in Full Control of the Theater is Liable.

It is stated on page 42 of the Opening Brief that the trial court must have concluded from the contract that Appellant was a co-proprietor and was engaged in the Fox U.A. Venture as a partner. This statement is entirely without foundation and the discussion with relation to corporations becoming partners has no bearing upon the issues of this litigation. Of course, plaintiff cannot predicate her cause of action upon the contract. She may and does rely upon the contract, however, as a matter of evidence to prove that appellant was in exclusive control of the theater at the time of the accident.

We come now to the argument of appellant that as manager of the theater it cannot be held liable upon the authority of *Thurman vs. The Ice Palace,* 36 Cal. App. (2d) 364; 97 Pac. (2d) p. 999. It is to be noted from a reading of the case cited that there is nothing said therein as to the duties of Mr. Eddy, graduate manager of the Associated Student Body, either in general or with particular reference to the hockey game under discussion. From the statement in the opinion it would appear that he had nothing to do with the hockey game whatsoever. Very definitely Mr. Eddy was not selected by the Ice Palace and the student body as their agent to manage the rink and the hockey game. Clearly the case is not in point

and the statement in the brief that Mr. Eddy bore the same relation to the organization as did the appellant here is in no wise borne out by the opinion. In fact the contrary appears. The appellant, Fox West Coast Agency clearly was the agent designated to operate and maintain the theater and as such had sole control of the equipment therein.

The position of appellant, as established by the evidence, is strikingly similar to that of the appellant corporation in the case of *Mollino vs. Ogden & Clarkson Corporation, et al,* 243 N.Y. 450, 154 N.E. 307, 49 A.L.R. 518.

In that case the defendant corporation, under the terms of a written agreement, was placed in sole and absolute control of a certain building as to its sale, lease and management, including its improvement and repair. Because of the negligence in effecting necessary repairs a chimney fell into the street causing injuries to the plaintiffs. The Court said:

> "Ogden & Clarkson Corporation was more than an ordinary broker to sell or lease real estate. This, it is true, was a part of its duty, but, under the agreement, it was obligated to perform the additional duty of keeping the property in repair. The corporation had possession of the building and had stipulated, under the agreement to make the necessary repairs."

See also:

McCourtie vs. Bayton, et al, 294 Pac. 238 (Wash.)
See numbered paragraphs 5, and 6, p. 240.

II.

The Trial Court Did Not Err in Admitting into Evidence the Complaint and Answer in a Prior Action Between the Parties.

The trial court admitted in evidence plaintiff's complaint and appellant's answer filed in a previous action in the State Superior Court, involving the same accident at issue here. These documents appear as plaintiff's exhibits. Nos. 6 and 7. Objections were made to the admission of these documents and overruled.

The objections are set forth in appellant's first specification of error beginning on page 8 of the opening brief and copies of the documents are likewise set forth commencing on page 14 of Appellant's Opening Brief. These pleadings were admitted to show an admission against interest made by appellant, to-wit: that it was operating the theater. The only purpose of admitting the documents in their entirety was to establish the identity of the issues involved in the previous superior court case and the instant action. The complaint was not admitted as proof of the truth of any of the allegations contained therein, except as such allegations were admitted by the answer. Paragraph IV of the complaint being plaintiff's Exhibit No. 6, alleged that the defendants, and each of them operated and maintained the United Artists Theater. The opening portion of Paragraph V of said complaint alleging that on the 24th day of March, 1940, plaintiff paid an admission to the theater to the defendants. Paragraph IV and so much of paragraph V as indicated, was not denied

in the answer, which is plaintiff's Exhibit 7. The balance of Paragraph V, beginning with the language, "that plaintiff was shown to a seat in said theater" was specifically denied by Paragraph II of the answer, which was plaintiff's Exhibit 7.

Clearly there is no reason why an admission against interest contained in pleadings cannot be admitted in evidence the same as admissions made in any other type of document. Appellant has cited no authority substantiating its position that such pleadings are not admissible and we believe that it cannot.

With respect to that part of the argument which points out that there was no date set forth in Paragraph IV of the complaint, we submit goes to the weight of the evidence and not as to its admissibility. Particularly is this true, when it is noted that appellant admitted, by a failure to deny, that plaintiff paid to defendant an admission to the theater on the 24th day of March, 1940, to view a motion picture offered by appellant (and other defendants.)

The statement is made by appellant that the trial court attached the utmost importance to this evidence. It is true that counsel for appellant and the court engaged in a long discussion as to whether or not the exhibits were admissible, but certainly there is nothing in this situation from which it may be determined how much importance the trial court attached to the exhibits after they had been admitted in evidence and in determining the issue. Moreover, we submit that the ruling of the court admitting the exhibits in evidence was unquestionably correct.

III.

The Trial Court Did Not Err in the Admission of Evidence of Statements of the Officer of Appellant Corporation Who Verified the Answer Nor in the Admission of Any of His Testimony.

Appellant complains of the admission of testimony relative to statements made by Mr. Bertero, Assistant Secretary of the Appellant Corporation, who verified the answer in behalf of the corporation in the instant case.

The argument is made that Mr. Bertero had no authority to bind the corporation by his statements in relation to material facts involved in the determination of this litigation. With reference to the question of authority it appears that Mr. Bertero was selected by the corporation to verify the answer in its behalf, as well as the answer in the previous superior court case. By doing so, can it be said that the corporation had not authorized Mr. Bertero to speak for it with reference to the facts involved in the litigation itself? It was he who was chosen to swear to the truth of the denials, admissions and allegations contained in these answers. It was Mr. Gallagher's position that Mr. Rountree and Mr. Bertero were not discussing any business transaction in which the appellant was interested. Certainly the appellant at the time of the conversation was very much interested in the litigation then pending between appellant and appellee and it was this very litigation and certain material facts involved in this litigation which was the subject of the testimony.

Were appellant's position to be accepted in this instance, then it would be impossible for a corporation to be bound by any statement of its executive officers with relation to any material fact involved in litigation. If Mr. Bertero

had not verified the answer, appellant's argument might be sound in the absence of proof of specific authority to discuss the litigation, or that it came within the specific duties of Mr. Bertero. Surely when a corporation selects an officer to verify a pleading, it may not thereafter deny the authority to speak with reference to the material facts referred to in such pleading.

Appellant makes very little point with reference to Mr. Bertero's testimony. There is no specific answer or answers pointed out, nor is it pointed out how any answer attempted to vary the terms of the written contract, which was plaintiff's Exhibit 5. In so far as any conclusions are concerned, Appellant could not be harmed because the witness testified in detail as to his duties and to the extent of his knowledge.

IV.

The Appellant Was Not Prejudiced with Reference to the Finding of Fact in Regard to the Defense of Contributory Negligence and the Finding that Appellee Was Not Negligent Was Supported by the Evidence.

Appellant complains of the findings relating to the defense of contributory negligence stating that disregarding the adjectives "negligently" and "carelessly," there are findings which necessarily result in the conclusion that plaintiff was guilty of contributory negligence. Appellant relies on the case of *Mardesich v. C. J. Hendry Co.,* 51 A.C.A. 782; 125 Pac (2d) 596 for its position on this point. We believe that a comparison of the findings of fact in the cited case and those now before the court will demonstrate that appellant's position is not well taken and that the opinion cited is not in point. In the opinion

of the court in the *Mardesich* case, the court inserted this subhead, "Incomplete findings conjunctive in form will not support judgment." This heading fully describes the discussion which follows. The paragraph of the opinion under the heading quotes from the findings at length, such findings stating it to be true that plaintiff did not negligently and carelessly do various acts. In other places the conjunctive "and" was used with reference to two or more acts. Likewise it is pointed out in the next paragraph of the opinion that certain of the affirmative allegations of the answer as to contributory negligence were not met by the findings at all. In contrast the finding now before the court, particularly Paragraphs IX and X, commencing on page 143 of the transcript uses the disjunctive "or" throughout and in said Paragraph IX, and likewise Paragraph X which appears on page 145 of the Transcript all of the allegations of the answer in this regard are specifically met by appropriate findings.

It is to be noted that appellant makes the general statement, "There are findings of probative facts which necessarily result in the conclusion that plaintiff was guilty of contributory negligence." However, these facts are not pointed out at all. However, considering the pleading of contributory negligence, and the finding with reference thereto, we must presume that appellant contends that plaintiff was necessarily guilty of contributory negligence because she sat down in the theater seat in a normal manner without having made a careful inspection or taken some other steps to determine that the seat would support her weight.

The trial court in Paragraph X of the finding specifically found against this proposition.

In Paragraph IX, the court found it not to be true that plaintiff spread, or strained, or misused this seat, or that she failed to control her body, or forced her body into the seat. Appellant's position in this regard is not well taken. Certainly having paid an admission to Appellant, plaintiff was entitled to rely upon Appellant furnishing her with a reasonably safe place to sit to view the motion picture. There is no argument that plaintiff's weight and size is greater than the average adult person, but on the other hand it is certainly not uncommon, which is a matter of common knowledge. There are many persons of equivalent or greater size or weight who attend theaters and like performances.

Appellant makes the statement that the testimony of the expert Cheney is conclusive proof that plaintiff misused the seat. The opinions of this witness are in no wise proof of any such thing. If there was any evidence in the record at all to show that plaintiff dropped her weight suddenly upon the seat, or used some degree of physical force to get into the seat, there might be some justification for Appellant's position. Plaintiff testified that she lowered the seat and sat down [Tr. p. 13]. Under cross-examination she stated that she lowered the seat at which time she was in a position facing at right angle to the screen and then turned to face the front of the theater and sat down [Tr. p. 16] "and in lowering myself into the seat my hips would come in contact with the arms." [Tr. p. 18.] Certainly this testimony does not show any misuse of the seat or the use of any physical force to get into the seat. Specifically, there is no evidence upon which an affirmative finding could be based to the effect that plaintiff permitted her body to come into unusual or severe

contact with the parts of the seat, or cause the seat to be subjected to an extreme or unusual stress or strain, or that she forced a portion of her body between the arms of the seat, or that she used the arms of the seat for a purpose for which they were not designed, or that she forced her body into the space existing between the arms of said seat, or that she exerted a great or unusual force sideways against each arm of the seat.

We submit that the finding with relation to the defense of contributory negligence was entirely proper.

With reference to the argument that the allegations of contributory negligence set forth in the answer admitted in evidence as plaintiff's Exhibit 7 not being denied, constituted proof of such contributory negligence, is wholly without merit. Under the rules of pleading in the state of California, the affirmative allegations of an answer are deemed denied. Consequently the admission in evidence of this answer which was admitted for an entirely different purpose, as previously shown herein, was no proof whatsoever of the truth of any of the facts alleged as an affirmative defense.

Conclusion

It is respectfully submitted that the record being free from error, and the judgment being supported by the evidence, the judgment of the District Court should be affirmed.

ROSECRANS & EMME and
BAYARD R. ROUNTREE,
Attorneys for Appellee.

No. 10171

United States

Circuit Court of Appeals

For the Ninth Circuit.

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

F. T. RITTER, C.P.A.

For Comm'r.:

SAMUEL TAYLOR, Esq.

Docket No. 98637

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1939

May 20—Petition received and filed. Taxpayer notified. Fee paid.

" 22—Copy of petition served on General Counsel.

Jul. 12—Answer filed by General Counsel.

" 12—Request for circuit hearing in Los An- Angeles, Calif. filed by General Counsel.

" 24—Notice issued placing proceeding on Los Angeles calendar. Answer and request served.

Oct. 17—Hearing set Dec. 4, 1939 in Los Angeles, Calif.

Dec. 4—Hearing had before Mr. Smith on merits. Submitted. Stipulation of facts filed. Briefs due 1/2/40—replies 1/25/40.

" 28—Brief filed by General Counsel.

" 30—Brief filed by taxpayer. 1/2/40 copy served.

1940

Apr. 9—Motion to cite the case of Guggenheim v. Rasquin filed by General Counsel. 5/7/40 granted.

Aug. 7—Motion to cite the case of Commissioner vs. Powers, C.C.A. 1st. and United States vs. Ryerson, C.C.A. 7th filed by General Counsel. 8/8/40 granted.

1941

Mar. 15—Memorandum findings of fact and opinion rendered, Smith, Div. 5. Decision will be entered under Rule 50. 3/17/41 copy served.

Apr. 15—Motion to vacate and set aside report, for rehearing and for leave to file amended answer, amended answer lodged, filed by General Counsel.

" 23—Order that memorandum findings of fact and opinion entered 3/15/41 be set aside and held at naught; amended answer lodged 4/15/41 be filed this date and restoring proceeding to the general calendar for hearing on the merits, entered.

1941

Apr. 28—Hearing set May 26, 1941 in Los Angeles, Calif.

Jun. 6—Hearing had before Miss Harron. Petitioner granted leave to file reply—resubmitted. Respondent's brief due 7/1/41. Petitioner's 7/15/41—reply 7/30/41.

" 6—Reply to amended answer filed by taxpayer. 6/16/41 copy served.

" 20—Transcript of hearing of June 6, 1941, filed.

Jul. 1—Brief filed by General Counsel.

" 15—Brief filed by taxpayer. 7/15/41 copy served.

Oct. 9—Motion to cite William H. Taylor case, C. C. A. 3rd Circuit, in support of respondent's brief filed by General Counsel.

" 10—Motion granted.

Dec. 9—Findings of fact and opinion rendered, Smith. Decision will be entered under Rule 50. 12/9/41 copy served. [1*]

1942

Jan. 5—Agreed motion to incorporate into the record stipulation of facts attached hereto, filed.

" 8—Order supplementing findings of fact promulgated 12/9/41 entered.

" 27—Computation of deficiency filed by General Counsel.

" 29—Hearing set Feb. 25, 1942 on settlement.

* Page numbering appearing at top of page of original Certified Transcript of Record.

1942

Feb. 16—Consent to settlement filed by taxpayer.

" 18—Decision entered, Smith, Div. 5.

May 7—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, filed by taxpayer.

" 8—Proof of service filed by taxpayer.

" 27—Designation of contents of record filed by taxpayer.

" 28—Proof of service filed. [2]

United States Board of Tax Appeals

Docket No. 98637

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-33-35-37-6th California) dated February 25, 1939, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with office at 1117 Bankers Building, Los Angeles, California. The returns for the period here involved were filed with the Collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on February 25, 1939.

3. The taxes in controversy are gift taxes for the calendar years 1933, 1935, and 1937, and in approximately the following amounts: [3]

1933—	$ 138.72
1935—	64.56
1937—	2465.20
Total—	$2668.48

4. The determination of tax set forth in said notice is based on the following errors:

1933

I. Respondent erred in including in petitioner's taxable gifts for 1933 the excess of the cost of certain single premium life insurance policies over the value of said policies as of the date of gift, as follows:

	Value Jan. 20, 1933	Premium Cost
Item 1. Policy No. 1,736,-388, Penn Mutual Life Ins. Co.	$17,371.75	$19,442.00
Item 2. Policy No. 784,-844, Connecticut Mutual Life Ins. Co.	36,763.50	38,565.50
	$54,135.25	$58,007.50
Excess over value at date of gift included by Respondent	$ 3,872.25	

1935

II. Respondent erred in including in petitioner's "total amount of net gifts for preced-

ing years'' the sum of $3872.25, as follows: [4]

Total amount of net gifts for preceding years per Respondent	$43,007.50
Total amount of net gifts for preceding years per Petitioner's return	39,135.25
Difference	$ 3,872.25

The deficiency letter does not disclose the exact source of the above difference but presumably it arises from the change in valuation by Respondent of the insurance policies donated by petitioner in 1933.

1937

III. Respondent erred in including in Petitioner's ''total amount of net gifts for preceding years'' the sum of $3,872.25, as follows:

Total amount of net gifts for preceding years per Respondent	$58,007.50
Total amount of net gifts for preceding years per petitioner's return	54,135.25
Difference	$ 3,872.25

The deficiency letter does not disclose the exact source of the above difference but presumably it arises from the change in valuation by Respondent of the insurance policies donated by Petitioner in 1933.

IV. Respondent erred in including in Petitioner's taxable gifts for 1937 certain gifts in trust, aggregating $29,662.49, the beneficiaries of the trust being six grandchildren, as disclosed in the [5] trustee's information return, Form 710.

V. Alternatively, if petitioner is held to have made taxable gifts in trust, aggregating $29,662.49 or any other sum, to her six grandchildren, during the year 1937, then respondent erred in failing to allow an exclusion for each of said grandchildren of $5,000.00, or an aggregate exclusion of $30,000.00 for the year 1937, in respect to such gifts.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

ISSUES I, II and III.

(a) On January 20, 1933, petitioner made an assignment of the following fully-paid single-premium life insurance policies,

Policy No. 1,736,388, of Penn Mutual Ins. Co.
Policy No. 784,844 of Connecticut Mutual Life Ins. Co.

to her three children as set forth in the copy of the gift filed with petitioner's return. As of the date of gift the cash surrender values of the policies were $17,371.75 and $36,763.50 respectively, and such values were returned by the petitioner in her gift tax return for 1933.

(b) Respondent has erroneously increased the value of said policies by using the cost of said policies to petitioner, $19,442.00 and $38,565.50, respectively, and has overstated her net gifts for 1933 accordingly. [6]

(c) Respondent has erroneously carried forward

in the year 1935 as "Net gifts for preceding years" the overstatement arising in the year 1933 in respect to the value of the insurance policies which were the subject of the gifts in the year 1933, and has assessed her gifts in the year 1935 at excessive rates as a consequence.

(d) Respondent has erroneously carried forward in the year 1937 as "Net gifts for preceding years" the overstatement arising in the year 1933 in respect to the value of the insurance policies which were the subject of the gifts in the year 1933, and has assessed her gifts in the year 1937 at excessive rates as a consequence.

ISSUE IV.

(e) On September 9, 1937, petitioner gave to the following persons (her grandchildren) in trust, public utility bonds having a value of $29,662.49.

Dana B. Fisher
Wayne H. Fisher, Jr.
Richard A. Yerge
Robert F. Oxnam
Phillip H. Oxnam
Betty Ruth Oxnam

Inasmuch as the petitioner is allowed an exclusion of $5,000.00 for the year 1937 for each donee the aforementioned gifts were not returned by petitioner in the year 1937.

(f) Respondent has erroneously determined that the aforementioned public utility bonds were return-

able by petitioner in the year 1937, and has overstated her total [7] gifts for the year 1937 by $29,662.49 accordingly.

ISSUE V.

(g) Respondent has allowed an exclusion of only $5,000.00 in the year 1937 in respect to the gifts in trust to petitioner's six grandchildren. If it is held that petitioner should return the value of said gifts to her six grandchildren, then petitioner is entitled to an exclusion of $5,000.00 for each of said six grandchildren, or an aggregate exclusion of $30,000.00 in respect to such gifts.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine that petitioner owes no deficiencies for the years 1933, 1935, and 1937.

F. T. RITTER
607 Jergins Trust Building
Long Beach, California
Counsel for Petitioner. [8]

(Duly verified.) [9]

POWER OF ATTORNEY
GENERAL

Know All Men by These Presents:

That Elizabeth H. Fisher of the City of Los Angeles, County of Los Angeles, State of California, has made, constituted, and appointed, and by these presents does make, constitute and appoint Wayne

H. Fisher her true and lawful Attorney for her and in her name, place and stead, and for her use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to her, and have, use and take all lawful ways and means in her name or otherwise for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for her and in her name, to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizing and possession of all lands, and all deeds and other assurances, in the law therefor and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements, and hereditaments, upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature or kind soever, and also for her and in her name, and as her act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothe-

cations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and Granting unto her said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as she might or could do if personally present, hereby ratifying all that her said Attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, she has hereunto set her hand and seal the 7th day of June nineteen hundred and twenty-seven.

[Seal] (Signed) ELIZABETH H. FISHER

Signed, Sealed and Delivered in the Presence of
(Sgd.) BETTY W. YATES

State of California
County of Los Angeles—ss.

On this 17th day of June A. D., 1927, before me a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Elizabeth H. Fisher known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand

and affixed my official seal the day and year in this certificate first above written.

(Sgd.) STELLA C. BARTHOLOMEW
Notary Public in and for said
County and State.

My commission expires February 26, 1929.

I have examined the original instrument and do hereby certify that this is a true, exact and complete copy of said instrument.

LOUIS A. AUDET
Notary Public in and for said
County and State.

My commission expires May 6, 1943. [10]

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cc--F. T. Ritter, Attorney
607 Jergins Trust Building
Long Beach, California.

EXHIBIT A

February 25, 1939

MT-ET-GT-676-33-35-37-6th California
Donor—Elizabeth H. Fisher
Mrs. Elizabeth H. Fisher,
1117 Bankers Building,
Los Angeles, California.
Madam:

You are advised that the determination of your

gift tax liability for the calendar years 1933, 1935, and 1937 discloses a deficiency of $2,668.48 ($138.72 for 1933, $64.56 for 1935, and $2,465.20 for 1937), as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed forms and forward them to this office. The signing and filing of these forms will expedite the closing of your returns by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the forms, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By: (signed) D. S. BLISS

Deputy Commissioner.

Enclosures:

Statement

Waivers

GLD R [11]

MT-ET-CT-676-33-35-37-6th California
Donor—Elizabeth H. Fisher

STATEMENT

1933

	Returned	Determined
Total gifts 1933	54,135.25	58,007.50
Less exclusion	15,000.00	15,000.00
Amount included	39,135.25	43,007.50
Less specific exemption	0.00	0.00
Net gifts	39,135.25	43,007.50
Tax on net gifts	724.06	862.78
Tax shown on return		724.06
Deficiency		138.72

SCHEDULE A

Item 1	17,371.75	19,442.00
Item 2	36,763.50	38,565.50

1935

Total gifts, 1935	30,000.00	30,000.00
Less exclusions	15,000.00	15,000.00
Amount included	15,000.00	15,000.00
Less specific exemption	0.00	0.00
Net gifts, 1935	15,000.00	15,000.00
Net gifts for preceding years	39,135.25	43,007.50
Total net gifts	54,135.25	58,007.50
Tax on total net gifts	1,342.10	1,545.39
Tax on net gifts for preceding years	723.05	862.78
Tax on net gifts, 1935	618.05	682.61
Tax assessed on return		618.05
Deficiency		64.56

[12]

2—Donor—Elizabeth H. Fisher

STATEMENT (Continued)

1937

	Returned	Determined
Total gifts, 1937	$76,368.33	$106,364.17
Less exclusions	35,000.00	40,000.00
Amount included	41,368.33	66,364.17
Less Specific exemption	40,000.00	40,000.00
Net gifts 1937	1,368.33	26,364.17
Net gifts preceding years	54,135.25	58,007.50
Total net gifts	55,503.58	84,371.67
Tax on total net gifts	2,745.32	5,559.03
Tax on net gifts for preceding years	2,633.17	2,970.68
Tax on net gifts, 1937	123.15	2,588.35
Tax assessed on return		123.15
Deficiency		2,465.20

SCHEDULE A

Item 10	9,275.00	9,412.50
Item 11	9,000.00	9,050.00
Item 12	7,000.00	7,150.00
Item 16	1,258.34	1,354.19
Total value of securities placed in trust as shown on the trustee's information return, Form 710	0.00	29,662.49
Exclusions	35,000.00	40,000.00

[Endorsed]: Filed May 20, 1939. [13]

United States Board of Tax Appeals

[Title of Cause.]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. I to V, inclusive. Denies the allegations of error contained in subparagraphs I to V, inclusive, of paragraph 4 of the petition.

5. (a) Denies so much of subdivision (a) of paragraph 5 of the petition as alleges that as of the date of gift the cash surrender values of the policies were $17,371.75 and $36,763.50, and admits all other allegations therein contained. [14]

(b) Denies so much of subdivision (b) of paragraph 5 of the petition as alleges that the respondent erroneously increased the value of the policies and also denies that the respondent overstated the net gifts of the donor for 1933, and admits all other allegations therein contained.

(c) Denies so much of subdivision (c) of paragraph 5 of the petition as alleges that the respondent erroneously carried forward into the year 1935 net

gifts for preceding years, and also denies that the respondent's action with respect to the gifts in 1933 constituted an overstatement, and also denies that the respondent has assessed the donor's gifts in the year 1935 at excessive rates, and admits all other allegations therein contained.

(d) Denies so much of subdivision (d) of paragraph 5 of the petition as alleges that the respondent erroneously carried forward into the year 1937 the net gifts for preceding years, and also denies that the respondent's action with respect to the gifts for 1933 constitutes an overstatement of the amount of the gifts for 1933, and also denies that the respondent has assessed the donor's gifts in the year 1937 at excessive rates, and admits all other allegations therein contained.

(e) Denies so much of subdivision (e) of paragraph 5 of the petition as alleges that the gifts were of public utility bonds, and admits all other allegations therein contained. [15]

(f) Denies so much of subdivision (f) of paragraph 5 of the petition as alleges that the respondent erroneously determined that the value of the securities were subject to the gift tax, and also denies that the respondent overstated the donor's total gifts for the year 1937 by the sum of $29,662.49, and admits all other allegations therein contained.

(g) Denies the allegations contained in subdivision (g) of paragraph 5 of the petition.

6. Denies generally and specifically each and

every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied and that the respondent's determination be in all respects approved.

(Signed) J. P. WENCHEL,
FTH
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
FRANK T. HORNER,
Special Attorneys,
Bureau of Internal Revenue.

FTH/W 7/639/39.

[Endorsed]: Filed Jul. 12, 1939. [16]

[Title of Board and Cause.]

AMENDED ANSWER

Comes now the respondent, Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits, denies and avers as follows:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are gift taxes for the calendar years 1933, 1935 and 1937 but

denies all other allegations contained in said paragraph 3 of the petition.

4. I to V inclusive. Denies the allegations of error contained in subparagraphs I to V inclusive, of paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b), (c), (d). Denies the allegations contained in subparagraphs (b), (c), and (d) of the petition.

(e) Denies so much of sub-paragraph (e) of paragraph 5 of the petition as alleges that the petitioner is allowed an exclusion of $5,000 for the year 1937 for each donee. Admits all other allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f) Denies the allegations contained in subparagraph (f) [17] of paragraph 5 of the petition.

(g) Admits so much of subparagraph (g) of paragraph 5 of the petition as alleges that the respondent has allowed an exclusion of only $5,000 in the year 1937 in respect to the gifts in trust to petitioner's six grandchildren. Denies all other allegations contained in subparagraph (g) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Further answering the petition, the respondent avers as follows:

7. In the deficiency notice, copy of which is attached to the petition, the respondent allowed one $5,000 exclusion with respect to the gifts made by

the petitioner under trust agreement dated September 9, 1937.

8. The said gifts in trust were gifts of future interests for which no exclusions are allowable under Section 504 (b) of the Revenue Act of 1932.

Wherefore, it is respectfully prayed that petitioner's net gifts for 1937 be increased from $26,-364.17, as shown in the deficiency notice, to $31,-364.17; that the deficiency be [18] increased accordingly and that the amount of such increase be left for determination under Rule 50. The respondent hereby asserts claim for said increase of deficiency as the statute in such case specifically provided.

(Signed) J. P. WENCHEL
AHF
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
LEWIS S. PENDLETON,
Special Attorney,
Bureau of Internal Revenue.
LSP/bj/ 4/14/41

[Endorsed]: Filed April 23, 1941. [19]

[Title of Board and Cause.]

REPLY

Comes now the petitioner, Elizabeth H. Fisher, by her attorney, F. T. Ritter, and replying to the

allegations contained in paragraphs (7) and (8) of respondent's amended answer, admits and denies as follows:

7. Admits the allegations contained in paragraph (7) of the amended answer.

8. Denies the allegations contained in paragraph (8) of the amended answer.

Wherefore, the petitioner prays that the Board determine that petitioner is entitled to an exclusion of $5,000.00 in respect of gifts during the year 1937 for each of said six grandchildren, or an aggregate of $30,000.00, and that petitioner owes no deficiency in respect to such gifts in the year 1937.

F. T. RITTER,
607 Jergins Trust Bldg.,
Long Beach, California
Counsel for Petitioner.

[Endorsed]: Filed June 6, 1941. [20]

[Title of Board and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Smith: This is a proceeding for the redetermination of gift taxes for the years 1933, 1935, and 1937 as follows:

1933	$138.72
1935	64.56
1937	2,465.20

The issues presented for decision are——

(1) Should an irrevocable gift of paid-up single premium life insurance policies on the life of the donor in the year 1933 be valued and assessed at the cash surrender value of the policies at the time of the gift or upon the cost of the policies to the donor? [21]

(2) Is the donor entitled to an exclusion of not to exceed $5,000 for each individual named beneficiary of a trust when making a gift in trust during the year 1937 (total exclusions $29,662.49) or to but one exclusion of not to exceed $5,000?

FINDINGS OF FACT.

The petitioner is a resident of Los Angeles, California. She filed gift tax returns for the years 1933, 1935, and 1937 with the collector at Los Angeles.

On January 10, 1933, petitioner purchased Policy No. 784844 of the Connecticut Mutual Life Insurance Co. of Hartford, Conn., paying therefor on said date a single premium of $38,565.50. The terms of the policy are that the insurance company, upon proof of the death of the insured, will pay $50,000 in accordance with the terms of an interest income agreement of the date of the policy or, if such agreement should terminate, to the insured's executors, administrators, or assigns (subject to the rights of the insured to change any beneficiary or mode of settlement). The cash or loan value of the policy on the date of the issuance, January 10, 1933, and on the date of the gift, January 20, 1933, was $36,-

763.50. The surrender value of the policy increases annually and after the policy has been in effect for five years is $38,836.50.

On January 11, 1933, the petitioner purchased Policy No. 1736388 of the Penn Mutual Life Insurance Co., paying therefor on said date a single premium of $19,442. By the terms of this policy the insurance company upon proof of the death of the insured agrees to pay to the beneficiary, the right being reserved by the insured to change the beneficiary, $25,000. The cash or loan [22] value of the policy on January 11, 1933, the date of issuance, and on January 20, 1933, the date of the gift, was $17,371.75. The cash surrender value of the policy increases annually and after it has been in effect for six years is $19,670.50.

On January 20, 1933, the petitioner entered into a trust indenture by which she assigned all of her rights to the policies to a trustee. The trustee is to pay the proceeds of the policy and any dividends received thereon in accordance with the terms of the trust.

In her gift tax return for 1933 the petitioner included these policies at their cash or loan values as of the date of the gift. The respondent determined that they should be included at their costs, namely, the amounts of premiums paid, and issued his notice of deficiency accordingly.

The deficiency determined for 1936 arises solely from the determination of the net gifts for preceding years, that is, whether the policies should be

included at their cash surrender values at the date of the gift or at the amounts paid for the policies by the petitioner.

The value of the two insurance policies donated by the petitioner in 1933 is the amounts paid for them by the petitioner.

On September 9, 1937, the petitioner created a trust and delivered to the trustee bonds of an agreed fair market value of $29,662.49. The trust was irrevocable and the petitioner assigned to the trustee all of her right, title and interest in and to the said bonds. The trust agreement provided that the income of the bonds should be paid to six named beneficiaries and [23] that upon the termination of the trust the proceeds should likewise be divided.

In her gift tax return for 1937 the petitioner, proceeding on the theory that six gifts were made through the trust agreement and that she was entitled to six exclusions of $5,000 each (not exceeding $29,662.49), did not include said sum of $29,662.49 in her gift tax return for the calendar year 1937. The respondent determined that there was but one gift, the gift to the trust, and that the petitioner was entitled to but one exclusion of $5,000. He also determined that the net gifts for preceding years should be based upon the costs of the two policies given away in 1933 and not on their cash sur ender values.

The petitioner is entitled to six exclusions of $5,000 each (not exceeding $29,662.49) upon her gifts made to the trustee in 1937.

OPINION.

The first question presented by this proceeding is whether the two paid-up single premium life insurance policies on the life of the donor should be valued at the cost of the policies to the donor, as determined by the respondent, or upon their cash surrender values at the date of the gift. This issue is decided in favor of the respondent upon the basis of Guggenheim v. Rasquin, ... U. S....., decided February 3, 1941.

The second question is whether the petitioner is entitled to six exclusions not exceeding in the aggregate $29,662.49, or to one exclusion of $5,000. This issue is decided in favor of the petitioner upon the authority of Commissioner v. Hutchings. .... U. S. ...., decided March 3, 1941.

[Seal]

Decision will be entered under Rule 50.

[Endorsed]: Entered Mar. 15, 1941. [24]

FINDINGS OF FACT AND OPINION OF DEC. 9, 1941

[Title of Board and Cause.]

Docket No. 98637. Promulgated December 9, 1941.

1. The value for gift tax purposes of single premium life insurance policies on the donor's

life which the donor transferred as a gift in trust, held, the cost of the policies to the donor. Guggenheim v. Rasquin, 312 U. S. 254.

2. In 1937 petitioner conveyed to a trustee, irrevocably, certain bonds for the benefit of her grandchildren. The net income of the trust was to be distributed annually on December 20 to the beneficiaries (or to their parents or guardians until they were 21 years of age) until they attained the age of 25 years, when their proportional interests in the trust corpus were to be distributed to them free of trust. If any grandchild should die without issue his share of income and corpus was to go to the surviving grandchildren of their issue. Held, as to the corpus of the trust, the gifts were limited to commerce in use, possession, or enjoyment at some future date and were therefore gifts of future interests with respect to which no exclusion is allowable under section 504 (b) of the Revenue Act of 1932. United States v. Pelzer, 312 U. S. 399. Held, further, that as to the income of the trust, there were gifts of present interests in the trust fund to each of the living grandchildren and that the donor is entitled to an exclusion, not to exceed $5,000 with respect to each of such gifts.

F. T. Ritter, C. P. A., for the petitioner.

Samuel Taylor, Esq., for the respondent.

This is a proceeding for the redetermination of

gift taxes for the years 1933, 1935, and 1937 as follows:

1933	$138.72
1935	64.56
1937	2,465.20

The issues presented for decision are:

(1) Whether, for gift tax purposes, two paid-up single premium life insurance policies on the life of the donor, purchased by the donor in the year 1933, should be valued at the cash surrender value of the policies at the time of the gift or at the cost of the policies to the donor. [25]

(2) Is the donor entitled to an exclusion of not to exceed $5,000 for each individually named beneficiary of a trust when making a gift in trust during the year 1937 (total exclusions $29,662.49), or to but one exclusion of not to exceed $5,000?

By an amended answer the respondent seeks to increase the deficiency determined for 1937 upon the ground that the gift of the trust established in 1937 was of "future interests" and that he erred in allowing an exclusion of $5,000 in respect of the gift to the trust.

FINDINGS OF FACT.

Petitioner is a resident of Los Angeles, California. She filed gift tax returns for the years 1933, 1935, and 1937 with the collector at Los Angeles.

On January 10, 1933, petitioner purchased Policy

No. 784844 of the Connecticut Mutual Life Insurance Co. of Hartford, Connecticut, paying therefor on said date a single premium of $38,565.50. The terms of the policy are that the insurance company, upon proof of the death of the insured, will pay $50,000 in accordance with the terms of an interest income agreement as of the date of the policy, or, if such agreement should terminate, to the insured's executors, administrators, or assigns (subject to the rights of the insured to change any beneficiary or mode of settlement). The cash or loan value of the policy on the date of the issuance, January 10, 1933, and on the date of the gift, January 20, 1933, was $36,763.50.

On January 11, 1933, the petitioner purchased Policy No. 1736388 of the Penn Mutual Life Insurance Co., paying therefor on said date a single premium of $19,442. By the terms of this policy the insurance company upon proof of the death of the insured agrees to pay $25,000 to the beneficiary, the right being reserved by the insured to change the beneficiary. The cash or loan value of the policy on January 11, 1933, the date of issuance, and on January 20, 1933, the date of the gift, was $17,371.75.

On January 20, 1933, the petitioner conveyed all of her rights in the policies to a trustee in trust for the benefit of her three adult children.

In her gift tax return for 1933 the petitioner included these policies at their cash or loan values as of the date of the gift. The respondent determined that they should be included at their costs, namely,

the amounts of premiums paid, and issued his notice of deficiency accordingly.

The deficiency for 1935 arises solely from the respondent's determination of the net gifts for preceding years. In such determination he included the policies in question at the amounts paid [26] for them by the petitioner rather than at their cash surrender values at the date of the gift.

The values of the policies for gift tax purposes are the amounts paid for them by the petitioner.

On September 9, 1937, the petitioner created a trust for the benefit of her six grandchildren and delivered to the trustee bonds of an agreed fair market value of $29,662.49. The trusts were declared irrevocable and the petitioner assigned to the trustee all of her right, title, and interest in and to the bonds.

The trust indenture provided in part as follows:

Second: The Trustee shall from the gross income received from said Trust Estate pay all taxes that may accrue against the Trust property or the income arising therefrom and all proper and necessary expenses of said Trust and the management thereof.

Third: The net income arising from said Trust Estate shall be disposed of by the Trustee as follows:

On or about the 20th day of December of each year the net income accumulated during said year up to the said time shall be distributed to the beneficiaries who have attained the age of twenty-one (21) years, and if under twenty-one years then to

the herein designated parent of such beneficiary for his or her use and benefit, in proportion to the share of each therein as herein provided until he or she reaches the age of twenty-five (25) years, at which time his or her share in the corpus of said Trust fund, together with any accumulated and undistributed income therefrom shall be delivered to the beneficiary arriving at such age free and clear of any control by the Trustee as his or her own property.

Fourth: The beneficiaries of this Trust are:

Dana B. Fisher and Wayne H. Fisher, Jr. sons of Wayne H. Fisher;

Robert F. Oxnam, Philip H. Oxnam and Betty Ruth Oxnam, children of Ruth Fisher Oxnam; and

Richard A. Yerge, son of Rachel Fisher Fayram.

Fifth: As to each beneficiary this Trust, subject to the provisions in paragraph "Sixth" thereof shall continue until he or she shall have attained the age of twenty-five (25) years, whereupon this Trust, as to such beneficiary so attaining said age, shall cease and determine and his share of the corpus of the Trust Estate, to-wit, one-sixth (1/6th) thereof together with one-sixth (1/6th) of any accumulated or undistributed income which may be in the hands of the Trustee at such time, shall go to and be delivered to such beneficiary so attaining the age of twenty-five (25) years.

Sixth: Should either or any of said beneficiaries named in this Trust die prior to the termination of said Trust as to him or her, leaving issue, then the corpus and income that such deceased beneficiary would have received had such beneficiary lived, shall go to and vest in the issue of said deceased beneficiary by right of representation and as to whom said Trust shall be deemed terminated by his or her death; and should either or any of said beneficiaries die prior to the termination of this Trust, as to him or her, without issue, then the share or interest that such beneficiary would have received, if living, shall go to and vest in equal shares in the surviving beneficiaries and to the children of any deceased beneficiary, if any, by right of representation. [27]

It was expressly provided in the trust agreement that none of the beneficiaries was to have any right to alienate any part of the income or corpus of the trust.

In her gift tax return for 1937 the petitioner, proceeding on the theory that six gifts were made through the trust agreement and that she was entitled to six exclusions not exceeding in the aggregate $29,662.49, did not include said sum of $29,662.49 in the total of the gifts made. The respondent determined that there was but one gift, the gift to the trust, and that the petitioner was entitled to but one exclusion of $5,000. By his amended answer the respondent claims that he erred in his allowance of the exclusion of $5,000 upon the ground that the

gifts in trust were gifts of future interests, and accordingly asks for an increase in the deficiency arising from such alleged error.

OPINION.

Smith: The first question presented by this proceeding is whether the two paid-up single premium life insurance policies on the life of the donor should be valued for gift tax purposes at the cost of the policies to the donor, as determined by the respondent, or at their cash surrender values at the date of the gift, as contended by the petitioner. This issue is decided in favor of the respondent upon authority of Guggenheim v. Rasquin, 312 U. S. 254.

The second question is what exclusions, if any, the petitioner is entitled to in respect of the trust which she created for the benefit of her six grandchildren in 1937. In the determination of the deficiency for that year the respondent allowed an exclusion of $5,000, upon the theory that a single gift had been made to the trustee.

The respondent now contends that he erred in allowing an exclusion of $5,000 (upon authority of Helvering v. Hutchings, 312 U. S. 393); that the gifts to the grandchildren were gifts of "future interests" within the meaning of section 504 (b) of the Revenue Act of 1932 as construed by the United States Supreme Court in United States v. Pelzer, 312 U. S. 399, and Ryerson v. United States, 312 U. S. 405; and that petitioner is not entitled to any exclusions in respect of such gifts. Section 504 (b) reads in part as follows:

"* * * In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts * * * shall not * * * be included in the total amount of gifts made during such year.

In article 11 of Regulations 79 (1936 Edition) "future interests" are said to include:

* * * reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or [28] estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

The above provisions of the regulations were given approval by the Supreme Court in United States v. Pelzer, supra. In that case there were gifts in trust to the donor's 8 living grandchildren and for any other grandchildren later to be born. The trustee was to accumulate the income for 10 years and thereafter pay it to the living grandchildren as they attained the age of 21 years in equal shares for life. There were provisions for gifts over of any deceased grandchild's share of distributable income. The trust was to continue for 21 years after the death of the last survivor of the named grandchildren, when the corpus and accumulated income were to be distributed to the surviving grandchildren (both named and unnamed), or the heirs of any deceased grandchild per stirpes. The Court held that the gifts made under the trust agreement were gifts of future interests within the

meaning of section 504 (b) above. Quoting from the committee reports recommending the enactment of section 504 (b) and from the Commissioner's regulations referred to above, the Court in its opinion said:

We think that the regulations, so far as they are applicable to the present gifts, are within the competence of the Commissioner in interpreting § 504 (b) and effect its purpose as declared by the reports of the Congressional committees, and that the gifts to the eight beneficiaries of the 1932 trust were gifts of future interests which are excluded from the benefits of that section. Here the beneficiaries had no right to the present enjoyment of the corpus or of the income and unless they survive the ten-year period they will never receive any part of either. The "use, possession or enjoyment" of each donee is thus postponed to the happening of a future uncertain event. The gift thus involved the difficulties of determining the "number of eventual donees and the value of their respective gifts" which it was the purpose of the statute to avoid.

The principal distinction between the instant case and the Pelzer case is that here the distribution of the trust income to the donees was to commence immediately within the year of the creation of the trust, rather than 10 years later, as in the Pelzer case. In other words, upon the creation of the trust each grandchild received an immediate right to a proportional share of the income from the $29,662.49 trust fund for a definite number of years, depend-

ing on his or her age at the date of the gift. We think that this right to receive such income was a gift of a present rather than a future interest.

In the Pelzer case the Court pointed out that the beneficiaries there had no right to the present enjoyment of the corpus or the income and would never receive any of the income or the corpus unless they survived the 10-year period. The beneficiaries here had the right to the present enjoyment of the income. This right was to continue until each beneficiary should attain the age of 25 years. [29]

In J. Willis Gardner, 41 B. T. A. 679, there was a gift in trust, the income to be paid to the beneficiary for 25 years or for life, whichever was the shorter period, when the corpus also was to be paid to the beneficiary if still living. We held, sustaining the Commissioner's determination, that the exclusions to which the donor was entitled on account of the gift were limited to the present value of the right of the beneficiary to receive the income of the trust for a period of 25 years. As to the corpus, we held that the gift was of a future interest.

Likewise, in Leopold E. Block, 41 B. T. A. 830, the gift of the income of a trust fund for life was held to be a gift of a present interest, in respect of which the donor was entitled to a $5,000 exclusion. See also Edith Pulitzer Moore, 40 B. T. A. 1019.

Here, we think that there were gifts to the six grandchildren of a present interest in the income of the trust. The amount of each of such gifts was the present worth of the right to receive one-sixth

of the income of the trust fund of $29,662.49 for the period during which it was to be paid to the donee.

We think that under the decision of the Supreme Court in the Pelzer case the gifts of the remainder interests, that is, the corpus of the trust, were gifts of future interests. The receipt of these gifts by the beneficiaries of the trust was contingent upon their attaining the age of 25 years. If any grandchild should die before that time, without issue, his or her share was to go to the survivors or their issue. There was no certainty whether, or to what extent, any of the beneficiaries would take upon fina distribution of the corpus of the trust.

The respondent makes the argument that the gifts to the beneficiaries were gifts of "future interests" because the beneficiaries would receive no distribution until December 20 of each year. The argument of the respondent appears to be that since the income of the trust to be collected by the trustee was not to be paid over to the beneficiaries until December 20, the beneficiaries did not have the "use, possession, or enjoyment" of the income from the date of the creation of the trust. Under this interpretation of the law a gift to the beneficiary of a trust would necessarily be of a future interest unless the beneficiary had the right to demand from the trustee his share of the income of the trust as it was received, month by month, or day by day.

We do not think that this is a correct interpretation of the statute. We think that where the trust

instrument provides that the income of the trust shall be distributed to the beneficiary annually or oftener the gift of the income is not a gift of a future interest.

Reviewed by the Board.

[Seal] Decision will be entered under Rule 50. [30]

United States Board of Tax Appeals

Washington
Docket No. 98637

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated December 9, 1941, the respondent herein on January 27, 1942 having filed a recomputation of tax and the petitioner on February 16, 1942 having filed an agreement to such recomputation, now, therefore, it is

Ordered and Decided: That there are deficiencies in gift tax for the calendar years 1933, 1935 and 1937 in the respective amounts of $138.72, $64.56 and $2,283.28.

[Seal] (Signed) CHARLES P. SMITH,
Member.

[Endorsed]: Entered Feb. 18, 1942. [31]

[Title of Board and Cause.]

MOTION TO VACATE AND SET ASIDE REPORT, FOR REHEARING, AND FOR LEAVE TO FILE AMENDED ANSWER.

Comes now the Commissioner of Internal Revenue, the respondent herein, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves that the Board (1) vacate and set aside its report entered herein on March 15, 1941; (2) grant a rehearing; and (3) permit the respondent to file the attached amended answer claiming an increase of deficiency. As grounds for his motion the respondent represents as follows:

In its memorandum opinion of March 15, 1941 the Board held that the gifts made by the petitioner under the trust agreement of September 9th, 1937, were gifts to the beneficiaries rather than to the trust as a separate entity, and that one exclusion should be allowed for each of the six beneficiaries.

On March 3, 1941, the Supreme Court handed down decisions in the cases of Commissioner vs. Hutchings, .. U. S.....; United States vs. Pelzer ..U. S.....; and Ryerson vs. United States (No. 495) .. U. S. ..... These cases hold that where transfers are made in [32] trust one $5.000.00 exclusion should be allowed for each beneficiary, provided the gifts are not gifts of future interests. In the Pelzer case, the Supreme Court upheld the validity of the gift tax regulations (art. 11 of Regs. 79 (1933

Ed. and also 1936 Ed.)) which define a future interest as any interest or estate whether vested or contingent, which is limited to commence in use, possession or enjoyment at some future date or time. The Supreme Court also held in that case that where the use, possession or enjoyment of the donee is postponed until the happening of a future uncertain event, the gifts are of future interests in property, within the meaning of section 504 (b) of the Revenue Act of 1932.

Under the terms of the trust agreement of September 9, 1937, the trustee was directed to accumulate the income until on or about the 20th day of December of each year and then to distribute it among such of the settler's grandchildren who had attained the age of 21 years, or to the designated parent of such of the settler's grandchildren who had not attained the age of 21 years, for their use and benefit. The trust was to terminate as to each grandchild upon attaining the age of 25 years, whereupon the trustee was to deliver his or her share of the principal and accumulated income to respective grandchildren. The trust further provided that should any of the beneficiaries die before termination of the trust leaving issue, then the corpus and income should go to such beneficiary's issue by right of [33] representation, but if either or any of them should die without issue prior to the termination of the trust, then his or her share should go to the surviving beneficiaries or to the children or any deceased beneficiary by right of representation.

It will be seen from the foregoing that the beneficiaries' possession and enjoyment of both income and principal were dependent upon future contingencies. Accordingly the gifts made to them involve the difficulties of determining the number of eventual donees and the value of their respective gifts, which the Supreme Court has said "it was the purpose of the statute to avoid."

In view of the above circumstances the Board under its power and duty "to do full justice to the parties while they are still before it", and in order to correct an error which would otherwise justify an appeal, should vacate its report and grant the parties a rehearing. Commissioner v. Edison Securities Corporation, (C.C.A. 4th, 1935) 78 F. (2d) 85; John Thomas Smith, (1940) 42 B.T.A.—No. 78; Hormel v. Helvering, (March 17, 1941) — U.S. —; and Helvering v. Richter, (March 17, 1941) — U.S. —. Furthermore, in order "to promote the ends of justice", the Board should grant the respondent's motion for rehearing in order to permit the filing of an amended answer claiming an increase of deficiency on account of the erroneous allowance of one $5,000.00 exclusion with respect to the trust agreement of September 9, 1937. Hormel v. Helvering, supra. It is immaterial that the respondent has changed his theory of the [34] case as the result of the intervening decisions of the Supreme Court. Cf. Milton Rubinstein, (1940) 41 B.T.A. 220, in which the Board overruled a long line of its prior decisions with respect to the issue here involved, on account of the intervening decisions of the circuit courts.

In the event that the Board, after consideration of the matters set forth herein, is not satisfied that the motion should be granted, it is respectfully requested and moved that it be set down for oral argument before a division of the Board sitting at Washington, D. C.

Wherefore, it is respectfully prayed that this motion be granted.

(Signed) J. P. WENCHEL
AHF

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

LEWIS S. PENDLETON,

Special Attorney, Bureau of Internal Revenue.

[Endorsed]: Apr 15, 1941 [35]

[Title of Board and Cause.]

ORDER RESTORING PROCEEDING TO GENERAL CALENDAR

On April 15, 1941, the respondent filed a motion to vacate and set aside the Memorandum Findings of Fact and Opinion entered in the above-entitled proceeding on March 15, 1941, and for rehearing, and for leave to file an amended answer by reason of the opinions of the Supreme Court handed down March

3, 1941, in the cases of Helvering v. Hutchings, —— U.S. ——, United States v. Pelzer, —— U.S. ——, and Ryerson v. United States, —— U.S. ——. The premises considered, it is

Ordered that the Memorandum Findings of Fact and Opinion entered March 15, 1941, be and the same is hereby set aside and held at naught. It is further

Ordered that the amended answer lodged with this Board on April 15, 1941, be filed as of this date. It is further

Ordered that the proceeding be restored to the General Calendar for hearing on the merits.

[Seal] (Signed) CHARLES P. SMITH
Member.

Dated, April 23, 1941.

CPS:oh [36]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between the petitioner, Elizabeth H. Fisher, and the Commissioner of Internal Revenue, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not at variance with the facts herein stipulated: [37]

10. On September 9, 1937, petitioner entered into a trust agreement, a copy of which is attached hereto and incorporated [38] herein as Exhibit D. Simultaneously with the execution of said trust agreement, petitioner delivered to the trustee named therein the assets described therein, having a fair market value of $29,662.49.

11. The petitioner, proceeding on the theory that six gifts were made through said trust agreement and that she was entitled to six exclusions (not exceeding the sum of $29,662.49), did not include said sum of $29,662.49 in her gift tax return for the calendar year 1937. The Commissioner determined that there was but one gift, a gift to the trust, and that petitioner was entitled to but one exclusion.

12. Nothing in this stipulation contained shall be deemed to preclude either party hereto from contesting by appropriate action any decision of the Board of Tax Appeals with respect to any of the issues herein involved.

(Signed) F. T. RITTER
Counsel for Petitioner

(Signed) J. P. WENCHEL
FTH
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent.

ST:E 11/22/39

[Endorsed]: Filed Dec. 4, 1939 [39]

EXHIBIT D

Trust Agreement

This Trust Agreement made and entered into this 9th day of September, 1937, by and between Elizabeth H. Fisher, of the County of Los Angeles, State of California, hereinafter called Trustor, and Wayne H. Fisher, of the County of Los Angeles, State of California, hereinafter called Trustee,

Witnesseth:

Trustee admits, certifies and declares that he has received from Elizabeth H. Fisher, Trustor, by assignment, transfer and delivery to him the following personal property, to-wit:

> $10,000 par value Cities Service Co. 5% bonds due April 1, 1958, the value of which at this date is $7,000.00;
>
> $10,000 par value Consolidated Gas Utilities Company 6% bonds, due June 1, 1943, the value of which at this date is $7,850.00;
>
> $10,000 General Public Utility Co. 6½% bonds due April 1, 1956, the value of which at this date is $8,300.00;
>
> $10,000 Indiana Service Co. 5% bonds due January 1, 1950, the value of which at this date is $6,400.00;

making a total of Twenty Nine Thousand, Five Hundred and Fifty Dollars, ($29,550.00). The said personal property so assigned, transferred and delivered to Trustee by Elizabeth H. Fisher, Trustor, is in-

tended to and does constitute and is hereinafter referred to as the Trust Estate.

Said Trustor agrees that the property so contributed in the creation of said Trust Estate shall hereafter remain and constitute the Trust Estate and that she, the Trustor, shall not have any right, title, estate or interest in or to the said property constituting the said Trust Estate, or [40] income therefrom, nor shall she have the power to alter, change, amend or revoke this Trust declaration and said Trustor declares that this Trust is not made in contemplation of death but is intended to and shall be an irrevocable trust, given by the said Trustor, absolutely, for the purpose of creating an estate for the beneficiaries named herein separate and apart from that of the Trustor and independent of the hazards that may be incident to the accumulation, creation and preservation in any estate of the Trustor and of assuring as far as possible to the beneficiaries herein named, the beneficial use of the income therefrom until this Trust as herein provided terminates as to him or her and the preservation of the principal for distribution to him or her at the time herein provided for and otherwise for his or her general welfare.

It is understood and agreed that no consideration is given by the Trustee for the transfer and delivery to him of said Trust Estate and that the same has been received and accepted and will hereafter be administered in Trust with the powers and for the

uses, purposes and benefits hereinabove and hereinafter set out and subject to the following conditions:

First: The said Trustor authorizes the said Trustee to retain the said Trust property to form and constitute the corpus of this Trust, and said Trustee shall in no event be personally liable for any depreciation in value of said Trust property, it being the express wish of said Trustor that said Trustee shall retain the Trust Property as delivered by the Trustor to him until he, in his judgment and discretion, deems it to the best interest of the beneficiaries to sell and reinvest the proceeds of said sale, he being given full [41] authority in his judgment and discretion from time to time to sell any of the assets constituting the corpus of the Trust and reinvest the same and to sell and dispose of as he may deem best, any right or rights which shall accrue to said Trustee as an incident to the ownership of any stock or bonds constituting the Trust Estate.

Second: The Trustee shall from the gross income received from said Trust Estate pay all taxes that may accrue against the Trust property or the income arising therefrom and all proper and necessary expenses of said Trust and the management thereof.

Third: The net income arising from said Trust Estate shall be disposed of by the Trustee as follows:

On or about the 20th day of December of each year the net income accumulated during said year up to said time shall be distributed to the beneficiaries who have attained the age of twenty-one (21)

years, and if under twenty-one years then to the herein designated parent of such beneficiary for his or her use and benefit, in proportion to the share of each therein as herein provided until he or she reaches the age of twenty-five (25) years, at which time his or her share in the corpus of said Trust fund, together with any accumulated and undistributed income therefrom shall be delivered to the beneficiary arriving at such age free and clear of any control by the Trustee as his or her own property.

Fourth: The beneficiaries of this Trust are:

Dana B. Fisher and Wayne H. Fisher, Jr. sons of Wayne H. Fisher; [42]

Robert F. Oxnam, Philip H. Oxnam and Betty Ruth Oxnam, children of Ruth Fisher Oxnam; and

Richard A. Yerge, son of Rachel Fisher Fayram.

Fifth: As to each beneficiary this Trust, subject to the provisions in paragraph "Sixth" thereof, shall continue until he or she shall have attained the age of twenty-five (25) years, whereupon this Trust, as to such beneficiary so attaining said age, shall cease and determine and his share of the corpus of the Trust Estate, to-wit, one-sixth (1/6th) thereof together with one-sixth (1/6th) of any accumulated or undistributed income which may be in the hands of the Trustee at such time, shall go to and be delivered to such beneficiary so attaining the age of twenty-five (25) years.

Sixth: Should either or any of said beneficiaries named in this Trust die prior to the termination of said Trust as to him or her, leaving issue, then the corpus and income that such deceased beneficiary would have received had such beneficiary lived, shall go to and vest in the issue of said deceased beneficiary by right of representation and as to whom said Trust shall be deemed terminated by his or her death; and should either or any of said beneficiaries die prior to the termination of this Trust, as to him or her, without issue, then the share or interest that such beneficiary would have received, if living, shall go to and vest in equal shares in the surviving beneficiaries and to the children of any deceased beneficiary, if any, by right of representation. [43]

Seventh: No beneficiary of this Trust shall be vested with the right, power or authority to sell, pledge, mortgage or in any other manner to encumber, anticipate or impair his or her beneficial or legal interest in the Trust or any part of the corpus thereof, and no part of the income or principal of the Trust Estate shall be subject to the claims of any creditor of the beneficiaries or either of them, or liable to attachment or execution or any other process of law and each distribution of income or principal of said Trust shall be made only to or on behalf of said beneficiaries, and each of them, as herein provided.

Eighth: The Trustor, except as to any limitations by said Trustee herein specifically set forth, and par-

ticularly except as to the time of distribution of income and corpus does by this agreement endow and vest said Trustee with sole discretion upon any matters in connection with the handling and management of said Trust Estate, and in his judgment and discretion to invest and reinvest the same and in all such matters his action shall be final and conclusive, the Trustor reposing full faith and confidence in the judgment and discretion of said Trustee.

Ninth: The Trusts herein created shall be irrevocable as to the said Trustor.

Tenth: The Trustor at any time may add to this Trust and the corpus thereof, other property, which, upon acceptance thereof by the Trustee, shall become a part of the Trust Estate to be held in Trust, managed, invested, re-invested and disposed of under and subject to this Trust Agreement and to each and all and every one of the terms, conditions and [44] provisions thereof.

Eleventh: In the event of the death of the Trustee herein named, Wayne H. Fisher, or of his legal incapacity or inability for any reason to act as Trustee, the Trustor appoints as successor to said Wayne H. Fisher, her daughter, Rachel Fisher Fayram, and in the event of her death or legal incapacity or inability for any reason to act as Trustee, the Trustor appoints as trustee hereunder her daughter, Ruth Fisher Oxnam.

Twelfth: The Trustor directs that no bond of any kind or character shall be required of the said

Wayne H. Fisher, or of his said succesors or either of them, acting in his or her capacity as such Trustee, either by said beneficiaries or any other person or authority.

Thirteenth: Said Wayne H. Fisher herein named as Trustee and each of the persons designated as possible successors to him in such capacity shall, in order to qualify as Trustee, sign and attach to this Trust Agreement a written acceptance of the terms and conditions hereof and of his or her election to act as Trustee, together with a receipt of said Trust property which may be received by him or her.

In Witness Whereof the Trustor has hereunto set her hand the day and year first above written.

(Signed) ELIZABETH H. FISHER

Witness:

(Signed) E. T. McMAHAN [46]

I, Wayne H. Fisher, Trustee named in the foregoing Trust Agreement do hereby acknowledge that I have received the same and I hereby accept the appointment of Trustee thereunder and under the Trust thereby created and agree to perform the terms and conditions of said Trust Agreement according to the best of my ability.

I further acknowledge that I have received as the corpus of the Trust Estate, all the Trust Property herein specified and set forth and I agree to hold said Trust Property and any other received by

me hereunder in the capacity of such Trustee under and in accordance with said Trust Agreement and not otherwise.

Witness my hand and seal this tenth day of September 1937.

(Signed) WAYNE H. FISHER

Signed

Witness

(Signed) E. T. McMAHAN

State of California
County of Los Angeles—ss.

I, Norma Berger, a Notary Public in and for the City and County of Los Angeles, State of California, residing therein, duly commissioned and sworn, do certify that on this 17th day of November, 1939, I carefully compared the foregoing copy of the Trust Agreement, dated September 9, 1937 and entered into between Elizabeth H. Fisher, of the County of Los Angeles, State of California, and Wayne H. Fisher, with the original thereof, now on file in the office of said Wayne H. Fisher.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, in the City and County of Los Angeles the day and year in this certificate first above written.

NORMA BERGER
Notary Public in and for the City and County of Los Angeles, State of California.

My Commission Expires Feb. 18, 1943

In the United States Circuit Court of Appeals for the Ninth Circuit

BTA—Docket No. 98637

ELIZABETH H. FISHER, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now, Elizabeth H. Fisher, the petitioner herein, by her attorney, F. T. Ritter, and respectfully shows:

I.

Nature of the Controversy.

The respondent determined deficiencies in gift tax against the petitioner for the calendar years 1933, 1935 and 1937 in the aggregate sum of $2,668.48. The deficiencies were based on two distinct and separable transactions of petitioner, and the deter- [47] minations of respondent in each matter were tried before the Board of Tax Appeals.

The first transaction was a gift by petitioner of life insurance policies in trust to her three adult children in the year 1933. The issue tried before the Board of Tax Appeals on this transaction related

solely to the valuation of these policies. The Board of Tax Appeals sustained the respondent in his valuation. Petitioner does not question the ruling of the Board of Tax Appeals in regard to this transaction, and does not ask a review thereof by the court.

The second transaction was a gift by petitioner of securities in trust to her six grandchildren in the year 1937. The trust provided in substance that the income thereof be distributed equally among the grandchildren until each reached the age of twenty-five years, at which time each donee took a prorata share of the corpus, if living, or, if deceased and without issue, such share went to the other donees. The issue tried before the Board of Tax Appeals related to the question of whether such gifts in trust to the donees were future interests in property or present interests in property, the gift tax to petitioner being less if the gifts were present interests in property.

The respondent argues, on the second transaction, among other contentions, that the trust provided for accumulation of the income by the trustee, and therefore the gift was a future interest in property. The petitioner contended the trust did not permit accumulation of income by the trustee, and that the [48] gift was a present interest in property. The Board of Tax Appeals found that the trust did not permit accumulation of income. Nevertheless, the Board of Tax Appeals held that the gift contained elements of both present and future interests in property, and decided that the right to receive the income cur-

rently was a present interest in property, while "the gifts of the remainder interests, that is, the corpus of the trust, were gifts of future interests". The sole point on which petitioner appeals to the court is whether the Board of Tax Appeals applied the correct rule of law in its decision on the gift in the year 1937.

II.

Court in Which Review is Sought.

The United States Circuit Court of Appeals for the Ninth Circuit is the court in which review of said decision of the Board of Tax Appeals is sought, pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

Venue.

The decision of the Board of Tax Appeals herein was rendered on or after February 18, 1942.

Petitioner is a citizen of the United States and has resided in the County of Los Angeles, State of California continuously for many years. She filed her Federal gift tax returns for the calendar years 1933, 1935 and 1937 with the [49] United States Collector of Internal Revenue for the Sixth Collection District of California; whose office is located at Los Angeles, California; and within the Ninth Judicial Circuit of the United States. The parties hereto have not stipulated that said decision may be re-

viewed by any court of appeals other than the one herein designated.

Wherefore, the petitioner prays that the decision of the Board of Tax Appeals herein, on the gift of petitioner in the year 1937, be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and the rules of said court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

Dated: April 27, 1942.

F. T. RITTER
100 East Ocean Avenue
Long Beach, California
Attorney for Petitioner.

[Endorsed]: Filed May 7, 1942 [50]

[Title of Circuit Court and Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To Honorable Guy T. Helvering, Commissioner of Internal Revenue, and J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, his attorney:

You are hereby notified that the above named Petitioner on May 7th, 1942, filed with the Clerk of the United States Board of Tax Appeals at Washington,

D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of said Board heretofore rendered in the above entitled cause; a copy of which petition for review is herewith served upon you.

Dated this 7th day of May, 1942.

(S) F. T. RITTER,
100 East Ocean Avenue
Long Beach, California
Attorney for Petitioner. [51]

Service of the above and foregoing notice, together with a copy of the petition for review therein mentioned, is hereby acknowledged, this 7th day of May, 1942.

J. P. WENCHEL
Chief Counsel, Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: Filed May 8, 1942 [52]

United States Board of Tax Appeals
Washington

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 55, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Prae-

cipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 2d day of June, 1942

[Seal] B. D. GAMBLE
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 10171. United States Circuit Court of Appeals for the Ninth Circuit. Elizabeth H. Fisher, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed June 19, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Case No. 10171

ELIZABETH H. FISHER, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

STIPULATION

It is hereby stipulated and agreed by and between

the attorneys for the respective parties hereto that the parts of the record on review designated by the attorney for the petitioner as necessary for consideration of the points on which the petitioner intends to rely, a copy of which designation is hereby attached, contain and constitute all of the evidence in this cause which is material to the said points.

Dated: June 30, 1942.

F. T. RITTER
100 East Ocean Ave.,
Long Beach, California
Attorney for Petitioner.

J. P. WENCHEL
Attorney for Respondent.

[Endorsed]: Filed Jul 7, 1942, Paul P. O'Brien, Clerk.

[Title of Circuit Court and Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.

Petitioner hereby states the points on which she intends to rely upon in this petition for review are as follows:

1. The Board of Tax Appeals erred in concluding that any part of petitioner's irrevocable gifts of property in trust, in the year 1937 to her six named living grandchildren were gifts of future interests in property where under the terms of the trust each

donee beneficiary was entitled to the enjoyment of the current income of the property in trust until he reached the age of twenty-five years, and thereupon to receive his pro-rata share of the property in trust, if living, or if not living, but with issue, to have such property in trust distributed among his issue.

2. In the alternative The Board of Tax Appeals erred, after concluding that the rights of the donees to receive the current income from the property were present interests in property, in not valuing such present interests upon a period of the life expectancies of the six named living donees, since the donees would always receive such income if living, to-wit, from the trust until they attained the age of twenty-five, and directly from the property thereafter for the rest of their natural lives.

3. The Board of Tax Appeals erred in holding that there was a deficiency of gift tax due from petitioner for the year 1937 in the sum of $2283.28, or any other sum, by reason of petitioner's gifts in the year 1937 being gifts of "remainder interests" or "future interests"

Petitioner hereby designates the parts of the record, as certified to the Clerk of the above entitled Court, as necessary for the consideration of the points as set forth above, as follows:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board, consisting of:

(a). Petition of Elizabeth H. Fisher, No. 98637, filed May 20, 1939.

(b). Answer to petition.

(c). Amended answer, lodged April 15, 1941.

(d). Reply.

3. Findings of fact and opinion:

(a). Promulgated March 15, 1941.

(b). Promulgated December 9, 1941.

4. Decision entered on February 18, 1942.

5. Respondent's motion to vacate and set aside report, for rehearing, and for leave to file amended answer, filed April 15, 1941.

6. Order of Board of Tax Appeals restoring proceeding to general calendar, dated April 23, 1941.

7. Stipulation of facts, dated November 22, 1939, excluding items 1 and 9 thereof, both inclusive, and Exhibits A, B and C thereof, as being irrelevant to this review.

8. Trust agreement of September 9, 1937, referred to as Exhibit "D" in stipulation of November 22, 1939.

9. Petition for review filed by petitioner, Elizabeth H. Fisher, together with proof of service of notice of filing said petition for review and of service of a copy of same.

10. This designation of contents of record on review with notice of filing and proof of service thereof.

F. T. RITTER
100 East Ocean Avenue,
Long Beach, California
Attorney for Petitioner.

[Endorsed]: Filed Jul 7, 1942.

No. 10171.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

F. T. RITTER,
100 East Ocean Avenue, Long Beach, California,
Attorney for Petitioner.

Parker & Baird Company, Law Printers, Los Angeles

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No. 10171.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

Opinion Below.

The only previous opinion in this case is that of the Board of Tax Appeals [R. 25-37], which is not yet reported.

Jurisdiction.

The petition for review [R. 52-55], involves a deficiency in gift tax for the year 1937 in the amount of $2,283.28 [R. 37], and is taken from a decision of the Board of Tax Appeals, entered February 18, 1942. [R. 37.] The petition for review was filed May 8, 1942 [R. 56], pursuant to the provisions of Sections 1141-1142 of the Internal Revenue Code.

Questions Presented.

There are two questions presented.

First question:

Where an irrevocable gift of property is made in the year 1937 by a donor to her six, named grandchildren, to be held in trust for their sole benefit until each donee grandchild attains the age of twenty-five years, during which time the full net income of the trust is to be distributed equally among the beneficiaries, and upon each donee reaching the age of twenty-five years,, his pro-rata share of the property is to be distributed to him free of the trust, or, if not living, to his issue, or otherwise, among the remaining donees, is such a gift a present interest in property to the donees, or a future interest in property for purposes of gift tax exclusion? The Board of Tax Appeals held that the rights of the donees to receive the income until attaining the age of twenty-five years were present interests in property, while "the gifts of the remainder interests, that is, the corpus of the trust, were gifts of future interests." [R. 36.]

Second question:

If the gift described above has a dual character, to-wit, both a present and future interest in property for gift tax exclusion purposes, is the proper period of time by which to value the right to receive the income from the property the life-spans of the donees, since each donee will under the gift receive such income from the property while it is in trust, and also for the rest of his life while the property is out of the trust? The Board of Tax Appeals held that the value of the right to receive the income was to be determined solely by the period while the property was in trust.

Statutes and Regulations Involved.

Revenue Act of 1932, 47 Stat. 169, ch. 209:

"Sec. 504. NET GIFTS.

* * *

(b) GIFTS LESS THAN $5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year."

Regulations 79 (1936 Edition):

"ART. 10. TOTAL AMOUNT OF GIFTS.—In determining the amount of gifts during any calendar year, there is excluded (save in the case of a gift or gifts of a future interest or interests) the first $5,000 of any single gift or aggregate of gifts made during such year to any one donee. A gift or gifts made during a given calendar year to any one donee of $5,000, or less, should not be listed on the return, unless consisting of a future interest or interests, or unless consisting of a present interest or interests created out of the same property in which a future interest or interests has been given. Gifts of future interests in property are required to be included in the total amount of gifts for the year even though the value of such gifts is $5,000, or less, and if such interest exceeds $5,000 in value, no part of the value is excluded from the total amount of gifts for the year whether the gift or gifts to be a single donee or to a number of donees. For example, if the donor during the calendar year made a gift to A of $5,000 in money, a gift to B of $6,000 in money, and a gift to

C of a future interest in property, such future interest being valued at $3,000, the total amount of gifts during such year, for the purposes of the tax, is $4,000.

"ART. 11. FUTURE INTERESTS IN PROPERTY.—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. 'Future interests' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity). or in a policy of life insurance, the obligations of which are to be discharged by payment in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. For the valuation of future interests, see subdivision (7) of article 19."

Statement.

This appeal is solely upon the conclusions of law reached by the Board of Tax Appeals.

The controversy involved in this review concerns the petitioner's gift taxes for the year 1937. In that year, petitioner, a grandmother, transferred irrevocably income securities, having a value of $29,662.49 [R. 43], in trust to her six, named grandchildren, with provision that the income from the securities, after paying taxes and necessary trust expenses, be distributed annually among the six

donees until each reached the age of twenty-five years. Upon attaining that age each donee took his share of the property free of the trust, or if not living such share went to his issue, or if not living and without issue, such share went to the remaining donees. [R. 44.]

The contestants stipulated to the facts found by the Board pertaining to the gifts [R. 42-52], with the exception of the finding that "the principal distinction between the instant case and the *Pelzer* case is that here the distribution of the trust income to the donees was to commence immediately within the year of the creation of the trust, rather than ten years later, as in the *Pelzer* case." [R. 34.]

The petitioner herein duly filed her gift tax return for the year 1937, reporting the gift of property in trust to her six named grandchildren. She took in said return in respect to such gift an exclusion from gift taxation of not exceeding $5000.00 for each of the six named donees.

The Commissioner of Internal Revenue subsequently levied a deficiency in respect to the donor's gift tax, allowing her but one exclusion from gift taxation of $5000.00. He took the position that petitioner's gift in the year 1937 was to the trust as a donee entity, and not to the six named grandchildren as donees.

The original proceeding before the Board in respect to this gift was brought on the alleged error of the Commissioner in holding that the gift was to the trust and not to the individual donees. The Board decided this issue in favor of the petitioner March 15, 1941, upon the authority of *Commissioner v. Hutchings,* 312 U.S. 393 (decided March 3, 1941.) [R. 25.]

Thereafter the respondent Commissioner filed a motion before the Board to set aside the Board's opinion of

March 15, 1941. The Commissioner alleged for the first time in said motion that the petitioner's gift of 1937 was in the nature of a future interest in property, to-wit, "it will be seen from the foregoing that the beneficaries' possession and enjoyment of both income and principal were dependent upon future contingencies." [R. 40.]

Thereafter, the Board ordered that its opinion of March 15, 1941, be set aside, and that the proceeding be restored to the general calendar for hearing.

In the ensuing proceeding before the Board, the petitioner argued that the income from the property was to be distributed to the donees currently under the trust, which constituted the necessary element of present enjoyment of the gift to make the gift a present interest in property to the donees for purposes of gift tax exclusion.

The Board, in its decision rendered February 18, 1942, found as a matter of fact that the income from the property during the trust was to be distributed at least annually among the donees. [R. 34.] It nevertheless held that the same gift to the same donee was in part a present and in part a future interest in property, to-wit, a present interest in property to the extent the donee would receive income from the trust, and a future interest to the extent of the same donees' right to receive the corpus. It thus answered neither the prayer of the respondent nor of the petitioner in full. In sole support of its conclusion by way of precedent the Board cited its own rulings in three recently decided cases. Oddly, if not significantly, neither respondent nor petitioner had cited these cases to the Board in argument. The rulings of the Board in these cases are novel and have not been heretofore reviewed by the Courts.

Specification of Errors.

Petitioner relies on all the points contained in his statement heretofore filed [R. 58-59], to-wit:

"1. The Board of Tax Appeals erred in concluding that any part of petitioner's irrevocable gifts of property in trust, in the year 1937 to her six named living grandchildren were gifts of future interests in property where under the terms of the trust each donee beneficiary was entitled to the enjoyment of the current income of the property in trust until he reached the age of twenty-five years, and thereupon to receive his pro-rata share of the property in trust, if living, or if not living, but with issue, to have such property in trust distributed among his issue.

"2. In the alternative The Board of Tax Appeals erred, after concluding that the rights of the donees to receive the current income from the property were present interests in property, in not valuing such present interests upon a period of the life expectancies of the six named living donees, since the donees would always receive such income if living, to-wit, from the trust until they attained the age of twenty-five, and directly from the property thereafter for the rest of their natural lives.

"3. The Board of Tax Appeals erred in holding that there was a deficiency of gift tax due from petitioner for the year 1937 in the sum of $2283.28, or any other sum, by reason of petitioner's gifts in the year 1937 being gifts of 'remainder interests' or 'future interests'."

Summary of Argument.

On the first question presented in this appeal as set forth herein, and as contained in the first specification of error, petitioner argues that to constitute a present interest in property for the purpose of gift tax exclusion it is only necessary that the donee receive the full enjoyment of the gift in the form in which the gift is given. It is not necessary for such purpose for the donee to have the immediate power to destroy the gift and defeat the beneficent purpose of the donor, in addition to receiving the full enjoyment of the proceeds of the gift. The Board of Tax Appeals applies the statute involved in the latter sense. Such a severe application of the statute is not supported by the decisions of the Courts.

On the second question presented, and as contained in the second specification of error, and in the *alternative,* petitioner argues that if in fact a gift of property to a donee will make him a life beneficiary of the income thereof, such fact should control in the appraisal of his right to receive such income from the property for the purposes of gift tax exclusion. The appraisal of the donees' right to receive income from the gift should not be controlled by a mere temporary form in which the property is conveyed to the donee, such as a temporary custody in trust for the donee's benefit, when the certain and ultimate

form is absolute ownership of the income from the property for the life of the donee.

The appraisal of the donees' present interest in the property by the Board of Tax Appeals in the instant case is based on mere form. The appraisal by the Board assumes that the donees will all die at the age of twenty-five, to-wit, when the temporary custodianship of the property by the trustee terminates, and therefore they will not receive the income thereafter. Either this, or it assumes someone else than the named donees will receive the income after they are twenty-five years of age. Such latter assumption is contrary to fact where the same donees receive after they are twenty-five years of age as received before they are twenty-five years of age. The appraisal formula of the Board disregards the fact, substance and reality of the property interests acquired by these donees from the donor.

ARGUMENT.

I.

The Donees Received a Present Interest in Property Entirely.

Plainly the statute relating to taxation of gifts during the years 1932 to 1938 permitted donors to exclude annually from gift taxation an amount up to the first $5000.00 given to each donee. (Sec. 504 (b), Revenue Act of 1932.) The evident purpose of Congress in this legislation was to encourage a broad distribution of wealth in the nation at that time by means of numerous small gifts. This distribution of wealth could not be effected by the transfer from donors to donees of a mere future interest in the property transferred, to-wit, an interest which was to commence in use, possession, or enjoyment at some future date. Accordingly, Congress limited the exclusion from gift taxation to be enjoyed by donors to gifts of present interests in property.

In the instant case the donor, a grandmother, divested herself in the year 1937, irrevocably of property, securities, having a substantial income, in order that her six named grandchildren might immediately have the enjoyment of such income. "* * * assuring as far as possible to the beneficiaries herein named the beneficial use of the income therefrom until this trust as herein provided terminates as to him or her and the preservation of the principal for distribution to him or her at the time herein provided for and otherwise for his or her general welfare." [R. 45.]

Because of the tender age of the six named donees, and their consequent inability to act competently, the donor placed the property in the temporary custody of her adult son as trustee, with adequate provision in the trust

for current distribution of all the income to the donees, and delivery of an aliquot share of the property creating the income to each donee grandchild when he attained the age of twenty-five years, this age being, in the donor's opinion, a time in the donee's life when he could protect his estate. In the event a donee died before reaching the age of twenty-five, the donor provided that his share of the property should go to his estate if he had descendants (issues), otherwise, such share should vest in the remaining donees. The donor was plainly motivated by the desire to transfer forever and exclusively the gift property and all the benefits of the ownership thereof to the six named donees. The trust was not intended by her to be a limiting device, and an end in itself, but merely a temporary custodianship or vehicle by which the securities would become the property of the six minor donees for the rest of their lives, and her beneficent purpose accomplished effectively.

The question in the instant case is: Did the gift of the donor amount to a present interest in property to the donees?

Several standards for the determination of the above question have been established by the decisions of the Courts and the Board of Tax Appeals, statutes, Congressional reports and text-books, and are discussed herewith.

The United States Supreme Court decided the case of *U. S. v. Arthur Pelzer,* 312 U. S. 399, March 3, 1941, which related to a donor's right to exclusion from gift taxes. Therein, in the year 1937, the donor conveyed property in trust for the benefit of living and after-born grandchildren, with a provision that the income of the trust would be accumulated in the trust for ten years from the creation of the trust. In its decision in the instant

case, the Board makes substantial reference to the *Pelzer* case, and therefore your petitioner will likewise discuss the facts and opinion of the *Pelzer* case (*supra*), by way of comparison with the gift of petitioner.

1. **The Income Tax Laws Set a Simple Standard for Determining Whether Donee Beneficiaries Have a Present Interest in Trust Property.**

Under *Sec. 162(b) of the Revenue Act of 1936,*[1] pertaining to income taxation, the donees of the gift in the instant case were chargeable with the income therefrom immediately after the gift. Such section provides in effect that if a trustee is required under the trust to distribute the income thereof annually among the beneficiaries, such income is reportable by the beneficiaries and not by the trustee. It is well recognized among tax students that the gift tax laws and income tax laws are of a complimentary nature. Unless the beneficial ownership of property has completely shifted from donor to donee, the donee is not chargeable with the income therefrom. In such a negative transfer, either the donor or the trustee is chargeable with the income tax on the income from the property. In the instant case, neither the trustee as a mere temporary custodian of the property, nor the donor, was chargeable with the income from the property after the gift, for the purposes of income taxes. Had the trustee been permitted to accumulate income in the trust, the trustee would have been chargeable with the income for income taxes. In

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[1] "(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income * * * which is to be distributed currently by the fiduciary to the beneficiaries, * * *, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *"

the instant case the donees were immediately chargeable with the income for income tax purposes. It seems axiomatic that a person charged with ownership of the present interest in property for income tax purposes should also be credited with the ownership of the present interest for gift tax purposes.

It is notable that, while not applied by the Court in the *Pelzer* case (*supra*), nevertheless, the beneficial interests created by the gifts in the Pelzer trust did not meet this test as to the ownership of the present interest by the donees. There the trustee is chargeable with the income tax on the income, since he was directed to accumulate the income for ten years. In that case, the Supreme Court held the gifts to be future interests in property. Applying this test, however, in the instant case (which was suggested by petitioner in argument before the Board), the Board should have concluded that the donees received a present interest in property exclusively.

2. The Reports of the Congressional Committee, in Creating Section 504(b), Set Another Simple Standard Frequently Referred to by the Courts.

An oft-quoted standard for determining the meaning of the term "future interests" in property for purposes of gift tax exclusion is the Committee report recommending the legislation pertaining to gift tax exclusion. (H. Rept. No. 708, 72d Cong., 1st Sess., p. 29; S. Rept. No. 665, 72d Cong., 1st Sess., p. 41.)

> "The term 'future interests in property' refers to any interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date. The exemption being available only in so far as the donees are ascertainable, the denial of

> the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts."

Stripped to bare essentials under this standard, a present interest in property for gift tax exclusion purposes must:

(a) Commence in possession or enjoyment immediately;

(b) The donees must be ascertainable.

The gifts in the present case commence in enjoyment immediately. The donor ceased to enjoy and the donees commenced to enjoy the property simultaneously when the donor transferred the property. It was as if the donor moved out of the house and the donees moved in to enjoy the property in the form in which the donor enjoyed it. It was a normal enjoyment, exactly the enjoyment the donor would have continued to have, had she retained the property.

The donees were ascertainable since they were named and living persons. The values of their respective gifts were determinable by dividing the value of the donated property by six (the number of named donees). The named persons were the exclusive donees under the gift. No other donees could take the gift. [R. 47.]

It was on the standard set by the Congressional Committee Report that the donees' interests in the *Pelzer* trust (*supra*), failed to qualify as gifts of present interests in property. There the court was troubled with the fact that the income from the gift property had to be accumulated by the trustee for ten years after the gift. Further, the donees included, besides named grandchildren of the donor,

all after-born grandchildren. In this dilemma the court said (*U. S. v. Pelzer*, 312 U. S. 399, p. 404):

> "Here the beneficiaries had no right to the present enjoyment of the corpus or of the income and unless they survive the ten-year period they will never receive any part of either. The 'use, possession or enjoyment' of each donee is thus postponed to the happening of a future uncertain event. The gift thus involved the difficulties of determining the 'number of eventual donees and the value of their respective gifts' which it was the purpose of the statute to avoid."

The above difficulties do not exist in the instant case by reason of the fact that the donees commenced to enjoy the gift property immediately, and that the donees were named exclusively.

In *Commissioner v. Krebs,* 90 Fed. (2d) 880, decided June 4, 1937, in a trust of strong similarity to the one at bar, and after consideration of the Congressional Committee Standard, the Third Circuit Court said:

> "We are further of the opinion that tested by the nature of the gifts to the *cestui que* trusts, the donor was entitled to the deduction. The donees were named, the respective values of the gifts to them were ascertainable, and they were given the use of the income and of the unexpended accumulated income without an intervening estate even though physical possession was postponed."

The Board applied the standard of the Congressional report in the instant case and found that "gifts of the remainder interests, that is, the corpus of the trust, were gifts of future interests." [R. 36.] Therein, petitioner contends the Board erred.

3. The Restatement of the Law of Property Furnishes a Further Standard by Which May be Determined the Nature of Property Interests Subject to Trust.

The *Restatement of the Law of Property*, Vol. 2, Sec. 153, page 520, says a present interest in property which is the subject matter of a trust is any interest which includes

> "either the right to the immediate beneficial enjoyment of the proceeds of the trust; or the right of the trustee forthwith to have the control and management of the affected thing pursuant to the provisions of the trust."

The above test is repeatedly used by the courts in determining whether the donee beneficiaries have a present interest for gift tax exclusion purposes. Under this test it is only necessary for the donees to have the immediate right to enjoy all the income from the trust in order to qualify their interests as present interests in property. This is equivalent to saying the beneficiary should immediately have all the fruit from the tree or all the milk from the cow to qualify his interest as a present interest. It does not say he necessarily has to have the right to use the tree for firewood, or cut up the cow for steaks. The right of alienation is unimportant (*Welch, et al. v. Paine*, 120 Fed. (2d) 141, 143):

> "Nor is it important, if true, that the interest of the minor beneficiary may in some way be available to his creditors."

The property must afford a benefit to the beneficiaries, it must be dedicated to that purpose, and the benefit must be available to the beneficiaries as an absolute right. It is

not necessary in addition thereto that the donees can destroy the property and defeat the purpose of a beneficent donor.

The right to the immediate enjoyment of the proceeds of the gift in a beneficial form is all that is required, preferably in the normal and beneficial form in which the donor enjoyed the property, and wished the donees to benefit therefrom.

Applying this test to a gift in trust where the income was to become a part of the principal, and accumulated until the donee beneficiaries were twenty-one years old, the Court, in *Welch v. Paine* (*supra*), held the donees' interests were future interests in property, saying:

> "As applied to the interests of a beneficiary under a trust, a 'future interest' is used by way of contrast to a 'present interest', which is characterized by the Restatement (*supra*), Sec. 153, as 'the right to the immediate beneficial enjoyment of the proceeds of the trust.' The minor beneficiaries in the present case clearly have not the right to the immediate beneficial enjoyment of the trust income."

In the case at bar, using this test (cited by petitioner in her brief below) the Board should have concluded that the interests conveyed to the donees were present interests in property, inasmuch as the Board found the donees were entitled to the income immediately within the year, to-wit:

> "The beneficiaries here had the right to the present enjoyment of the income." [R. 35.]

In failing to so conclude that donees had a present interest in the light of this test, the Board erred.

4. **The Board Did Not Follow the Rulings of the Court.**

The matter of construing the character of a gift for the purpose of gift tax exclusion has been before District Courts, Circuit Courts of Appeal, and the Supreme Court. Several of these cases are reviewed herewith.

A. In the matter of *U. S. v. Arthur Pelzer,* 312 U. S. 399, decided March 3, 1941, the Supreme Court had before it a trust designated the 1932 Pelzer Trust, in which the donor, a grandfather, conveyed property in trust for the benefit of eight named grandchildren, and any other after-born grandchildren. The income from the property in trust was to be accumulated for a period of ten years after the transfer of the gift. After the ten year period had elapsed, such living grandchildren as had attained the age of twenty-one years were entitled to share in the annual income from the then property in trust. The property in trust was to be distributed *per stirpes* twenty-one years after the death of the last named grandchild. The Court under these circumstances held that the property interests received by the donees were future interests in property.

The Court, in the *Pelzer* case (*supra*), settled several broad principles for the determination of the present or future interest character of the gift. First, that local or state definitions of the term "future interest in property" have no controlling effect as that term is used in the Federal Gift Tax Act: second, that the regulations issued by the Commissioner construing Section 504(b) are properly interpretive of such section and carried out the Congressional intent as indicated by the Committee Reports; third, that the Congressional Committee Report establishes a standard by which the character of a gift might be judged; and fourth, that the character of the gift is to be

determined from what the donee receives as a property interest.

It is apparent from the language used by the Court in the *Pelzer* case (*supra*), that if the beneficiaries in a trust have the right to the present enjoyment of the income thereof, that it would conclude the beneficiaries have a present interest in the gift property. There is no hint or suggestion in the *Pelzer* case (*supra*), that the same gift to the same person could at one and the same time be a present interest and a future interest in property. Neither the Supreme Court, nor any other Court, has assigned such a dual character to a gift to either one donee or one class of donees. Particular significance must be attached to the concluding words of the Court in the *Pelzer* decision, to-wit:

> "We have no occasion to consider the definition of future interests in other respects than those presented in the present case."

The Board of Tax Appeals in the instant case did not follow the decision of the Supreme Court, and erred in that it did not hold the gift to be a present interest in property. Petitioner's gift in the year 1937 meets every standard of a present interest in property as set forth in the *Pelzer* case (*supra*).

B. In the matter of *Commissioner of Internal Revenue v. Krebs,* 90 Fed. (2d) 880, decided June 4, 1937, the donor made a gift of property in trust to his three named children. The trustee was directed to use the income from property in the trust for the support and education of the donees until they reached the age of twenty-five, and to pay any unexpended income to the donees

directly. The Court there held that the gift was a present interest in property for the purpose of gift tax exclusion. The Court said (*Commissioner of Internal Revenue v. Krebs*, 90 Fed. (2d) at 881):

> "We are further of the opinion that tested by the nature of the gifts to the *cestui que* trusts, the donor was entitled to the deduction. The donees were named, the respective values of the gifts to them were ascertainable, and they were given the use of the income and of the unexpended accumulated income without an intervening estate even though physical possession was postponed."

The determination of the Third Circuit Court of Appeals in this case was entirely consistent with the standards set down by the Supreme Court in the *Pelzer* case (*supra*), almost four years later. The trust in the *Krebs* case (*supra*), in so far as it is described in the decision, bears marked similarity to the trust in the instant case. In each case the income from the property was to be distributed to the donees and they therefore enjoyed the property *in presentae*. It is apparent that the Board did not follow the ruling of the Court in *Commissioner v. Krebs* (*supra*).

C. In the matter of *Noyes v. Hassett*, 20 Fed. Sup. 31, decided July 13. 1937, the donor made gifts of property in trust to four named children, each trust being separate. The trustees were directed to pay the net income from the property in trust to each donee in quarterly installments for life. The trustees were enpowered to accumulate income in their discretion or to make payments from principal but the child could not demand such payments. Each child had a power of appointment. The Court held that

the gift had the character of a present interest in property.

The decision in *Noyes v. Hassett* is likewise consistent with the determination of the Supreme Court in *U. S. v. Pelzer* (*supra*), decided almost four years later. The donee had the right to the immediate beneficial enjoyment of the proceeds of the trust which furnished the necessary element to qualify the donee's interest as a present interest in property.

The donees in the instant case had the same right to the present enjoyment of the property transferred and their interests likewise qualify as present interests in property.

The Board did not follow the ruling of the Court in this case.

D. In the matter of *Welch v. Paine,* 120 Fed. (2d) 141, decided June 3, 1941, the donor, a father, made gifts of property in trust for the sole benefit of named minor children. The trust required the income to become part of the principal and to be accumulated until the beneficiaries reached the age of twenty-one. At that age, each beneficiary was to receive his interest in the trust, free from the trust. The trustee could advance in his discretion sums for the education of the beneficiaries out of their respective shares. The Court held that such gifts were gifts of future interests, stating, at page 143 (120 Fed. (2d) 141):

> "Here both possession of the corpus and enjoyment of the income are postponed; . . . The minor beneficiaries in the present case clearly have not the right to the immediate enjoyment of the trust income."

The First Circuit Court, citing *U. S. v. Pelzer* (*supra*), in its use of the above language "the minor beneficiaries in the present case clearly have not the right to the immediate beneficial enjoyment of the trust income" indicated clearly that under the standards set out in the *Pelzer* case, the critical test is the right to the immediate beneficial enjoyment of the trust income.

It is evident in the instant case that the Board of Tax Appeals has interpreted *U. S. v. Pelzer* (*supra*) in a different manner than the First Circuit Court of Appeals.

E. In the matter of *Paine v. Welch*, 42 Fed. Supp. 348, decided December 12, 1941, the donor made gifts of property in trust to her eighteen named grandchildren. In addition, the donee clause included after-born grandchildren. Trustees, in their discretion, could distribute any part of the principal or income. Upon death, each donee's share was to be paid to his estate. The Massachusetts District Court there held that the gifts were present interests in property. This decision is subsequent to *U. S. v. Arthur Pelzer* (*supra*), and is consistent with the standards therein set forth. Here the distribution of income was discretionary with the trustees and the final dissolution of the trust as to a donee was not required until the death of such donee. It is very apparent that neither the District Court, nor the courts in the previously discussed cases, considered that to qualify the interest as a present interest in property the donee had to have

such an immediate physical possession of the property that he could destroy it and defeat the beneficent purposes of the donor. It was sufficient if he had "the right to the immediate beneficial enjoyment of the proceeds of the trust." (*Welch, et al. v. Paine,* 120 Fed. (2d) 141, at 143.)

It is interesting to note that the Board of Tax Appeals promulgated its opinion in the instant case (*Fisher v. Commissioner*), December 9, 1941, to-wit, three days prior to the decision of the Massachusetts District Court in *Paine v. Welch,* (42 Fed. Supp. 348).

The Board does not agree with the Court that "the right to the immediate beneficial enjoyment of the proceeds of the trust" is sufficient to qualify the donee's interest as a present interest in property.

F. In the matter of *Commissioner of Internal Revenue v. Brandegee,* 123 Fed. (2d) 58, decided October 30, 1941, the donor made gifts in trust to her four living children. The terms of the trust permitted the trustees to acquire property subject to encumbrances, and provided that the donee beneficiaries would not be entitled to the net income while any such encumbrances remained unpaid. The Court held that property interests acquired by the donees were future interests inasmuch as the trustees had the power to withhold all income from the beneficiaries while any such encumbrances assumed by the trust re-

mained unpaid. In discussing the nature of present interests, the First Circuit Court of Appeals in this case states:

> "In the foregoing discussion we have assumed that the gift of an immediate life interest in income is to be regarded as a present interest, and we so hold."

It is apparent that the views of the First Circuit Court of Appeals do not conform to the views of the Board in that the Board holds that physical possession is the essential quality of a present interest in property.

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In summation it may be stated that the courts have uniformly established the simple rule that a gift is either a present interest or a future interest in property, depending upon whether the donees immediately enjoy the income from the gift property as a matter of right, and upon whether the donees could be deprived of such right of enjoyment during their natural lives. Possession of the corpus of trust property in the donee is not necessary as long as the donee had the right to all the income.

Here in the instant case the donees had the right to enjoy the income for their natural lives since the trustee was required to distribute the income to them until they were twenty-five years old, and thereafter the same donees had to receive the income from the property since the property itself was then distributed to them free of the trust. There were no remaindermen as the Board erroneously concludes in its opinion. [R. 36.]

II.

If the Present Interest in the Gift Property Is Solely the Donees' Right to Receive the Income the Value of Such Present Interest Should be Based Upon the Entire Period for Which Such Income Will be Received.

The petitioner argues, in the alternative, that if this Court upholds the Board of Tax Appeals to the effect that petitioner's gift in the year 1937 to her six named grandchildren is a gift of a present interest in property, merely to the extent that the donees have a right to the enjoyment of the income therefrom, that then, and in that case, the value of such present interest should be based upon the entire period during which the donees will receive such income. Under the opinion of the Board, the value of this right to receive the income is computed only on the short period the property remained in trust.

The Board of Tax Appeals supports its decision in the present case by citing its own decisions in *J. Willis Gardner,* 41 B. T. A. 679; *Leopold E. Block,* 41 B. T. A. 830; and, *Edith Pulitzer Moore,* 40 B. T. A. 1019.

An examination of the *Leopold E. Block* case (*supra*), decided April 12, 1940, by the Board, discloses a vastly different factual situation from the instant case. In the *Leopold E. Block* case (*supra*), the trustor, a husband and father, made a gift of property in trust with the provision in said trust that all net income would be distributed to his wife for her life. After the death of the wife (life

beneficiary), the income was to go to the descendants of the trustor, if the trustor was still living. When both the trustor and his wife were deceased, the corpus of the trust was to be distributed to the trustor's descendants. The Board held that the right of the wife to receive the income for life was a present interest, and that the rights of the descendants of trustor to receive the income or corpus as remaindermen were future interests in property. Here we have the typical life tenant and remainderman gift—two donees having adverse interests. The formula of the Board was made to fit this situation. Definitely the life tenant would have a present interest in property, and definitely the enjoyment of the property by the remaindermen, entirely different persons with adverse interests, would be postponed until the death of the life tenant. They had no enjoyment of the proceeds of the gift until the life beneficiary interest had ceased. Their interest was a future interest in property.

An examination of the *J. Willis Gardner* case (*supra*), decided March 29, 1940, discloses in the trust referred to that the donor made a gift of property to his nephew in trust. The donee was to receive the income from the property for twenty-five years, or for the period of his natural life, whichever was the shorter. If the donee was alive twenty-five years from the date of the gift, the property was to be distributed to him free of the trust. Otherwise, the property was to go to his heirs at law. The Board held that the value of the donee's present interest in the gift property was restricted to the right to receive the income for twenty-five years. The Board's holding in this case is wrong, for it is contrary to the rules adopted by the Courts. It does not strengthen the

Board's conclusion in petitioner's case by the citation thereof, since the Board's ruling has not been reviewed by the Courts. In both this case, *J. Willis Gardner* (*supra*), and the *Leopold E. Block case* (*supra*), the Board supports its decision by way of precedent by citing its previous holding in *Edith Pulitzer Moore* (*supra*).

An examination of *Edith Pulitzer Moore* (*supra*), decided December 5, 1939, discloses that the donor, a wife and mother, made a gift of property in trust with the provision that all the net income was to be paid to her husband in convenient installments during his life. After the death of her husband, the property was to be held in trust for the benefit of three sons, in a designated order of preference. The Board member who wrote the decision described the gift as "a gift in trust for A for life, and the remainder to B if he survives A." The Board held that the interests created by the trusts succeeding the death of the husband were future interests, while the gift to the husband of the right to receive the income was a present interest in property. Here again there were definitely adverse interests of a life tenant and remaindermen. The enjoyment of the property on the part of the remaindermen was definitely postponed to the death of the life tenant. It was in the *Edith Pulitzer Moore* case (*supra*) that the Board developed its formula for prorating the gift partly as a present interest in property and partly as a future interest in property. There, however, the present interest and the future interests were owned by distinctly different donees, each having adverse interests to the other. The formula of the Board fits such a case. The formula, however, is not a ready-made suit that can be put on every gift case. It needs sub-

stantial altering if it is to be made to fit the various types of gifts that arise. It is not possible by means of this formula to create adverse interests where none exist. For example, in the instant case, the petitioner's donees, as recipients of the income of the property, had no adverse interests to themselves as recipients of the corpus at the age of twenty-five years. They continued to receive the income from the property after they reached the age of twenty-five years, as well as before. The plain, simple fact is, that under the terms of the gift, the petitioner's donees had to receive the income from the property for life.

By way of further illustration that the Board cannot ignore the substance of a gift, let us suppose that a donor had made a gift of property in trust to his father, age ninety at the time of the gift, with a direction that the income from said property in trust be paid to the donee until he reached the age of one hundred twenty-five years. Very evidently the Board should disregard the mere formal words of the trust, and should restrict the present interest to the right to receive the income for the life of the donee. It should examine the reality of a gift if it is to apply its formula. As frequently stated in matters of taxation by the Courts, the collection of taxes cannot be dependent upon legal niceties or legal fictions. Tax laws have to be given a practical effect in order to accomplish their purpose.

U. S. v. Kirby Lumber Co., 284 U. S. 1.

The ready-made formula adopted by the Board to fit all cases of this type assumes in the instant case that petitioner's donees will die as they reach the age of twenty-five and that they, as such donees, will no longer receive the income from the property. This is a plain disregard of the fact, substance and reality of the property interests acquired by the donees from the donor. The Board has here created a pure legal fiction, comparable to the old legal fictions of common law, to-wit, the case must fit the writ, instead of the writ fitting the case.

Very plainly in the instant case the donor-petitioner, in making her gift in the year 1937 was not concerned with trusts, or interests in trusts as such. Her purpose was to convey the property to the donee grandchildren, so that they, and none other than they, would receive the property and all the benefits therefrom. The trust enters into the gift as a temporary custodianship for the period of a few years of financial incompetency on the part of the donees. Its purpose was solely to protect the donees during that period of financial incompetency. Plainly there was no period in the entire lives of the donees subsequent to the gift when they would not receive and enjoy the income from the property. There were no remaindermen or "remainder interests" as the ~~Court~~ Board states in its opinion. There was only one donee interest, and that was the interest of the petitioner's primary donees. There were no secondary donees.

Conclusion.

It is submitted, therefore, that the Board erred in concluding that the value of the present interests in the gift property was the right to receive the income until the donees became twenty-five years of age. It should have concluded that the donees had the right to receive the income from said property for the rest of their lives.

It is further submitted that if the Board followed the simple rules for determining present interests as set down by the Courts, it should have decided that the property interests acquired by the donees in the instant case from their donor, in the year 1937, were entirely present interests in property, inasmuch as the donees' interests in such gift meet every standard set down by the Courts in the determination of a present interest in property for the purpose of gift tax exclusion. They received the immediate enjoyment of the proceeds of the gift, the value of the property was ascertainable, and the number of donees was ascertainable.

It is therefore urged that the Board of Tax Appeals improperly applied the law to the facts found in this case, and that it should have found that there was no deficiency in petitioner's gift taxes for the year 1937.

Respectfully submitted,

F. T. Ritter,

Attorney for Petitioner,

No. 10171

In the United States Circuit Court of Appeals for the Ninth Circuit

ELIZABETH H. FISHER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
LOUISE FOSTER,
Special Assistants to the Attorney General.

INDEX

CITATIONS

485154—42

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10171

ELIZABETH H. FISHER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 25-37) is reported in 45 B. T. A. 958.

JURISDICTION

This review involves gift tax for 1937. (R. 52–53.) The Commissioner's deficiency letter to the taxpayer was issued February 25, 1939 (R. 12–13), and a petition to the Board of Tax Appeals was filed by the taxpayer May 20, 1939 (R. 1), which was within the period allowed by Section 272 (a) (1) of the Internal Revenue Code. This review is taken from the Board's decision entered February 18, 1942, allowing a deficiency for 1937 in the amount of $2,283.28. (R. 37.) The petition for review by this Court was filed May 7, 1942 (R. 52–55), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether, in creating a trust for the benefit of her grandchildren, the taxpayer made gifts of future interests to the extent of the gifts of the trust corpus and so is not entitled to any $5,000 exclusions under Section 504 of the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
>
> * * * * *
>
> SEC. 504. NET GIFTS.
>
> * * * * *
>
> (b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 Ed.):

> ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not

supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The pertinent facts, as found by the Board of Tax Appeals, are as follows (R. 27–32):

The taxpayer, a resident of Los Angeles, California, created a trust on September 9, 1937, for the benefit of her six grandchildren and delivered to the trustee bonds of an agreed fair market value of $29,662.49. The trusts were declared irrevocable and the taxpayer assigned to the trustee all of her right, title and interest in and to the bonds. (R. 27, 29.)

The trust indenture provided in part as follows (R. 29–31):

> Second: The Trustee shall from the gross income received from said Trust Estate pay all taxes that may accrue against the Trust property or the income arising therefrom and all proper and necessary expenses of said Trust and the management thereof.
>
> Third: The net income arising from said Trust Estate shall be disposed of by the Trustee as follows:
>
> On or about the 20th day of December of each year the net income accumulated during said year up to the said time shall be distributed to the beneficiaries who have attained the age of twenty-one (21) years, and if under twenty-one years then to the herein designated parent of such beneficiary for his or her use and benefit, in proportion to the share of each therein as herein provided until he or she reaches the age of

twenty-five (25) years, at which time his or her share in the corpus of said Trust fund, together with any accumulated and undistributed income therefrom shall be delivered to the beneficiary arriving at such age free and clear of any control by the Trustee as his or her own property.

Fourth: The beneficiaries of this Trust are:

Dana B. Fisher and Wayne H. Fisher, Jr., sons of Wayne H. Fisher;

Robert F. Oxnam, Philip H. Oxnam and Betty Ruth Oxnam, children of Ruth Fisher Oxnam; and

Richard A. Yerge, son of Rachael Fisher Fayram.

Fifth: As to each beneficiary this Trust, subject to the provisions in paragraph "Sixth" thereof shall continue until he or she shall have attained the age of twenty-five (25) years, whereupon this Trust, as to such beneficiary so attaining said age, shall cease and determine and his share of the corpus of the Trust Estate, to-wit, one-sixth (1/6th) thereof together with one-sixth (1/6) of any accumulated or undistributed income which may be in the hands of the Trustee at such time, shall go to and be delivered to such beneficiary so attaining the age of twenty-five (25) years.

Sixth: Should either or any of said beneficiaries named in this Trust die prior to the termination of said Trust as to him or her, leaving issue, then the corpus and income that such deceased beneficiary would have received had such beneficiary lived, shall go to and vest in the issue of said deceased beneficiary by right of representation and as to whom said Trust shall be deemed terminated by his or her death; and

> should either or any of said beneficiaries die prior to the termination of this Trust, as to him or her, without issue, then the share or interest that such beneficiary would have received, if living, shall go to and vest in equal shares in the surviving beneficiaries and to the children of any deceased beneficiary, if any, by right of representation.

It was also expressly provided in the trust agreement that none of the beneficiaries was to have any right to alienate any part of the income or corpus of the trust. (R. 31.)

In her gift tax return for 1937 the taxpayer, proceeding on the theory that six gifts were made through the trust agreement and that she was entitled to six exclusions not exceeding in the aggregate $29,662.49, did not include such sum in the total of the gifts made. The Commissioner determined that there was but one gift, the gift to the trust, and that the taxpayer was entitled to but one exclusion of $5,000. By his amended answer the Commissioner claimed that he erred in his allowance of the exclusion of $5,000 upon the ground that the gifts in trust were gifts of future interests, and accordingly asked for an increase in the deficiency arising from such alleged error. (R. 31–32.)

The Board rejected the Commissioner's determination in part by holding that the taxpayer made gifts of a present interest in the income of the trust, the value of each gift being the present worth of the right to receive one-sixth of the income of the trust fund during the period it was payable to the donee. But the Board approved the Commissioner's determination as

to the gifts of the remaining interests and so held that the gifts of the corpus of the trust were gifts of future interests. Accordingly, it decided that there is a deficiency for 1937 in gift tax of $2,283.28. (R. 34–37.)

SUMMARY OF ARGUMENT

The Board correctly held that the gifts of the corpus of the trust were of future interests and so cannot be excluded in the computation of the gift tax due from the taxpayer. The beneficiary of a trust is to be treated as the donee and the nature of the gift is to be determined by what such beneficiary receives. If the trust limits the gift by providing that the beneficiary's use, possession or enjoyment of the thing given is to commence at some future date or is contingent upon the happening of an uncertain event in the future, the gift is one of future interest. As the facts here show that so far as the gifts of the corpus are concerned, the gifts would not take effect until each beneficiary reached the age of twenty-five and not then if the beneficiary was not living, such gifts are clearly of future interests.

ARGUMENT

The Board correctly held that the gifts of trust were of future interests and that no exclusion in respect thereto is allowable

In computing gift tax, a taxpayer is allowed by Section 504 (b) of the Revenue Act of 1932, *supra,* to exclude up to $5,000 of gifts made to any donee in a year unless the gifts are of future interests in property. After several conflicting decisions of lower courts as to who should be considered the donee in case of gifts in

trust, the Supreme Court held in *Helvering* v. *Hutchings,* 312 U. S. 393, that the beneficiary, not the trustee, is the donee under the above section. It also held in *United States* v. *Pelzer,* 312 U. S. 399, that in determining the nature of gifts in trust it was not required to follow any local law in defining "future interests" and decided that the gifts there involved were of future interests because the beneficiaries had no right to the present enjoyment of the corpus of the trust or of the income. In reaching this conclusion the Court approved Article II of Regulations 79, *supra,* which is involved here and which states that,

> "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time.

In these cases, the Supreme Court did not find it necessary to decide whether gifts of trust income, currently distributable, are gifts of present or future interests.[1] But in the instant case, the Board decided that the gifts of trust income are of present interests, and we do not contend otherwise. The Board allowed exclusions for the value of these present interests, which in each instance was considerably less than

[1] As to this see *Commissioner* v. *Gardner, supra; Helvering* v. *Blair*, 121 F. 2d 945 (C. C. A. 2d); and dissenting opinion in *Rheinstrom* v. *Commissioner*, 105 F. 2d 642 (C. C. A. 8th). Attention is also called to the fact that in case of gifts made after 1938, no exclusions are allowable if the gift is in trust. Section 1003, Internal Revenue Code.

$5,000, but allowed no exclusions as to the rest of the gift. We submit that the Board's holding that the gifts of corpus are gifts of future interests is correct and is in accord with the *Pelzer* case. As indicated in that case, as well as in the *Hutchings* case, we are now required (after a period of several conflicting decisions) to look to the interest which the trust instrument gives the beneficiary in order to determine whether he has received a gift of present or future interest. *Commissioner* v. *Gardner,* 127 F. 2d 929 (C. C. A. 7th); *Commissioner* v. *Brandegee,* 123 F. 2d 58 (C. C. A. 1st). If it is found that the enjoyment, use, or possession of the interest which has been given must be postponed until some future time whether definitely set or dependent upon an uncertain event, it must be concluded that the gift is of a future interest. *Commissioner* v. *Boeing,* 123 F. 2d 86 (C. C. A. 9th); *Welch* v. *Paine,* 120 F. 2d 141 (C. C. A. 1st); *Commissioner* v. *Glos,* 123 F. 2d 548 (C. C. A. 7th). The gifts of corpus were gifts of this character and so it has been correctly held that no exclusions are allowable as to them.

In contending otherwise, the taxpayer argues in substance that there was only one gift to each beneficiary and that it must be treated as a gift of a present interest because the gift of income was a present interest and the same gift cannot involve both a present interest and a future interest. (Br. 19.) We submit that the taxpayer is in error whether we take the view that each beneficiary received two gifts or one gift. Certainly the trust agreement sets out two distinct kinds of interests which were given to the beneficiaries and we prefer

to speak of them as two kinds of gifts, namely (1) the gifts of the net income of the trust estate to be distributed among the named beneficiaries on December 20th of each year until each reached the age of twenty-five (R. 29) and (2) gifts of the trust corpus to be distributed to the same beneficiaries upon reaching the age of twenty-five, but if any should die prior to that time, his share is to be paid to his issue, if any, and if there is no issue, then to the other beneficiaries (R. 30–31). Thus it is clear that of the two separate interests which each beneficiary got only the first can be classified as a present interest. Whether there is one gift or two it is necessary to value the present interest as distinguished from the future interest since the statute allows an exclusion only in regard to the former. Article 11 of Treasury Regulations 79, *supra,* also prohibits the exclusion of any part of the value of a future interest, and this is what the Board has done here.

Moreover, it is not significant, as the taxpayer appears to think, that the second group of gifts was made to the same beneficiaries as the first group. Indeed it frequently happens that a beneficiary may receive different kinds of interests and each may pertain to the same piece of property. Sometimes, as in the *Pelzer* case, these different interests may all be future interests, but there is no reason why a gift of a present interest and of a future interest may not be made as here, and the fact that both pertain to the same property does not merge the gifts into one of a present interest. If the trust had provided for a gift of income to A for a term of years to be distributed currently

and a gift at the end of such term of the trust corpus to B, the latter would certainly be a gift of a future interest. See *Commissioner* v. *Brandegee, supra,* at page 62. And the gifts here are essentially the same as that made to B in the hypothetical case.

Two of the cases the taxpayer relies largely on are *Commissioner* v. *Krebs,* 90 F. 2d 880 (C. C. A. 3rd), and *Noyes* v. *Hassett,* 20 F. Supp. 31 (Mass.),[2] but both of these cases applied tests which are no longer approved in gift tax cases and they have been in effect overruled by later cases. At the time the *Krebs* and *Noyes* cases were under consideration the principal issue in cases of this kind was whether the trust or the beneficiary was the donee, and it was held there that the trust was the donee. At that time this issue was approached from the standpoint of what the donor owned and gave away. As the donor creating an irrevocable trust of property owned outright would necessarily transfer a present interest if he parted with his entire interest, it was thought that the present interest must go to the trust as it was the one receiving legal title and in control of the trust fund. Under this theory gifts in trust had to be gifts of present interests. See *Commissioner* v. *Wells,* 88 F. 2d 339 (C. C. A. 7th), which has been specifically overruled by *Commissioner* v. *Gardner, supra.* But as we have indicated above, we are now required to approach the issue here from

[2] The taxpayer also refers to *Paine* v. *Welch,* 42 F. Supp. 348 (Mass.), now pending on the Government's appeal to the Circuit Court of Appeals for the First Circuit and believed to be contrary to decisions of that court cited herein. Moreover, the facts in that case are distinguishable from those here.

the standpoint of the beneficiary. As to this changed viewpoint see *Commissioner* v. *Boeing, supra.*

The taxpayer apparently argues that the fact that beneficiaries here may be taxable on the income distributed currently by the trustee proves that they have a present rather than a future interest in the corpus. The taxpayer is in error in assuming that there is a necessary correlation between the gift tax and income tax. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 47. Moreover, any interest in the corpus which went with the right to income was an equitable one, not a legal one, and was only for a limited period. But the gifts of corpus with which we are concerned here are gifts of the entire interest, legal as well as equitable, and are not to be enjoyed, if at all, until each beneficiary becomes twenty-five years of age. The donee's possession and enjoyment of the corpus is necessarily postponed until the termination of the trust and hence is a future interest.

The Board's decision is in accord with *Charles* v. *Hassett,* 43 F. Supp. 432 (Mass.). There the donor gave $5,000 to a trustee to pay the income to A while living and to pay the principal to him, one-third at twenty-five, one-third at thirty and one-third at thirty-five, but if he died before full distribution, then the gift went over to other persons. In answering the question as to what part of the gift, if any, was of a present interest, the court said (pp. 434–435):

> * * * the answer is that historically lawyers have treated gifts of income beginning at once and lasting for life, or for a period of years, as a "present interest" and gifts of principal at a

> future date as a "future interest"; that Congressional committees and the Treasury appear to have had some such distinction in mind; and that this and other circuits in construing the gift tax statute have used that line of distinction in cases where the gifts of income and of principal were to different persons. * * * No historical reason justifies abandoning the distinction in cases where the gifts of income and of principal are to the same person and are therefore regarded by donor and donee as one gift. * * *
>
> On the basis of authority, I conclude that the gifts of corpus here are gifts of "future interests in property" and are subject to the gift tax, and that the gifts of income here are gifts of "present interests" and are excludable up to $5,000 for each beneficiary.

We submit the same conclusion should be reached here.

CONCLUSION

The Board's decision is correct and should be affirmed.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
LOUISE FOSTER,
Special Assistants to the Attorney General.

SEPTEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

NO. 10173

United States

Circuit Court of Appeals

For the Ninth Circuit.

IN THE MATTER OF BERLIN and RUSSELL AIRCRAFT MACHINE and MANUFACTURING COMPANY, a copartnership,

Debtor,

CALIFORNIA EMPLOYMENT COMMISSION, an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership of H. M. BERLIN and C. T. RUSSELL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

NO. 10173

United States

Circuit Court of Appeals

For the Ninth Circuit.

IN THE MATTER OF BERLIN and RUSSELL AIRCRAFT MACHINE and MANUFACTURING COMPANY, a copartnership,

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Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

EARL WARREN,
Attorney General of the State of California.

JOHN J. DAILEY,
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For Appellee:

CHARLES PECKHAM,

710 Title Insurance Bldg., Los Angeles, Calif. [1]*

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division.

No. 38270-H

IN BANKRUPTCY

In the Matter of:

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership,

Debtor.

AGREED STATEMENT OF CASE

The California Employment Commission was at all times involved herein and is now the duly appointed and acting administrative agency of the State of California created by and exercising the powers conferred upon it by the public statute of the State of California known as Chapter 352 of the Statutes of 1935, as amended (Deering Act No. 8780d, as amended), hereinafter referred to as the Unemployment Insurance Act.

The Debtor, Berlin and Russell Aircraft Machine and Manufacturing Company, a co-partnership of H. M. Berlin and C. T. Russell, was formed and commenced business operations in the State of California on or about November 7, 1941, with its principal place of business located in the City of Los Angeles, County of Los Angeles, State of California.

On or about April 3, 1941, the Debtor filed in the above-entitled Court and proceeding its petition un-

der Chapter XI of the Federal Bankruptcy Act; pursuant to the order or permission of the Court, the Debtor continued in possession of its business and property, and continued to operate the same until May 16, 1941, on which date the Debtor ceased operations.

During the first quarter of the calendar year 1941, that is, the [2] period commencing January 1, 1941, and ending on March 31, 1941, the Debtor paid wages to its employees in the State of California in the total amount of $42,400.17. During the period commencing on April 1, 1941, and ending on May 16, 1941, the Debtor paid wages to its employees in the State of California in the total amount of $23,828.88.

During all of said period from January 1, 1941, to May 16, 1941, the Debtor had in its employ in the State of California eight or more employees on each day of each week, excepting only holidays and certain Saturdays. After May 16, 1941, the Debtor had no employees.

During all of said period from January 1, 1941, to May 16, 1941, there was in effect Rule 12.1 of said California Employment Commission providing in substance that the term "week," as used in said Unemployment Insurance Act, shall mean the period of seven consecutive days commencing Sunday and ending Saturday. A copy of said Rule 12.1 is attached hereto marked "Exhibit A" and is incorporated herein by reference.

On or about November 25, 1941, there was filed

in the above-entitled proceedings on behalf of said California Employment Commission a proof of priority claim for taxes and interest itemized as follows: Contributions for period from January 1, 1941, to May 16, 1941, $1,798.83; interest on said amount of $1,798.83 at the rate of one per cent per month or fraction thereof from July 22, 1941, to November 30, 1941, 89.94; plus additional interest on said amount of $1,798.83 at the rate of one per cent per month or fraction thereof from December 1, 1941, to date of payment. A copy of said proof of priority claim is attached hereto marked "Exhibit B" and is incorporated herein by reference.

Thereafter, the Debtor denied liability for the above-mentioned [3] taxes and requested instructions, whereupon the above-entitled Court ordered a hearing upon the priority claim of said California Employment Commission, to be had before said Court on December 29, 1941. Pursuant to agreement of the parties, said hearing was continued to January 5, 1942, on which date the matter was duly heard by said Court.

Thereafter and on January 26, 1942, the above-entitled Court made and entered its order wherein it was adjudged and decreed that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment Commission heretofore filed herein for unemployment tax is denied. A copy of said order

is attached hereto marked "Exhibit C" and is incorporated herein by reference.

Thereafter and on February 20, 1942, the California Employment Commission duly filed with the above-entitled Court a notice of appeal from said order made and entered on January 26, 1942. A copy of said notice of appeal is attached hereto marked "Exhibit D" and is incorporated herein by reference.

On March 18, 1942, the above-entitled Court made and entered an order allowing the California Employment Commission to April 30, 1942, to file the record on appeal herein. A copy of said order is attached hereto, marked "Exhibit E" and is incorporated herein by reference. On April 22, 1942, the above-entitled Court made and entered an order further extending said time to May 21, 1942. A copy of said order is attached hereto marked "Exhibit F" and is incorporated herein by reference. On May 15, 1942, the United States Circuit Court of Appeals for the Ninth Circuit made and entered an order further extending said time to and including June 22, 1942. A copy of said order is attached hereto marked "Exhibit G" and is [4] incorporated herein by reference.

The points to be relied on by the California Employment Commission, appellant herein, are as follows:

1. The District Court erred in ordering, adjudging, and decreeing that under the provisions of Sec-

tion 9, Section 37 and Section 38 of the California Unemployment Insurance Act, the calendar year extending January 1 to December 31, inclusive, constitutes the taxable year.

2. The District Court erred in ordering, adjudging and decreeing that under the aforementioned provisions of the California Unemployment Insurance Act, a week constitutes a period of seven (7) days, beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year, only in the event that such day is one of the seven days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Act means twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

3. The District Court erred in ordering, adjudging and decreeing that since January 1, 1941, fell on a Wednesday, and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than twenty weeks within the calendar year of 1941.

4. The District Court erred in ordering, adjudging and decreeing that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment

Commission [5] heretofore filed herein for unemployment tax is denied.

EARL WARREN,
Attorney General of the State of California.
JOHN J. DAILEY, Deputy
MAURICE P. McCAFFREY,
SAMUEL L. GOLD, and
GLENN V. WALLS, of Counsel.

By: SAMUEL L. GOLD,
Attorneys for California Employment Commission.

Approved by:

CHARLES PECKHAM,
Attorney for Debtor.

Approved, this 19 day of June, 1942.

H. A. HOLLZER,
Judge of the Above-Entitled Court..

[Endorsed]: Filed June 20, 1942. [6]

EXHIBIT A

State of California
Department of Employment
Rules and Regulations of California
Employment Commission
Revised Rule

Rule 12.1 — Term Week Defined. The term "week," unless the wording clearly otherwise re-

quires, whenever used in the Act, Rules and Regulations, forms, procedures and instructions thereon and all other official pronouncements of the Department of Employment, shall mean the period of seven consecutive days commencing Sunday and ending Saturday.

This revised rule shall become effective September 29, 1940, provided that an employing unit shall not become an employer subject to the Act solely by reason of its employment of four or more individuals upon said effective date if such employing unit has not, prior to said effective date, employed four or more persons in each of more than nineteen "weeks".

(Effective Date: September 29, 1940) [7]

EXHIBIT B

In the District Court of the United States
in and for the Southern District of
California, Central Division

No. 38270-H
In Proceedings Under Chapter XI
Proof of Priority Claim for Taxes
Employer's Account No. 51-3560

In the Matter of BERLIN & RUSSELL AIRCRAFT COMPANY,

Debtor.

On the 25th day of November, 1941, came Charles J. Ross and made oath and said:

1. That he is one of the authorized and acting agents of the California Employment Commission, and as such he is qualified and empowered to make this claim on behalf of the said Commission:

2. That the consideration of the debt is a tax duly levied and assessed under the provisions of the Unemployment Insurance Act, as amended.

3. That he is informed and believes the said Berlin & Russell Aircraft Company, Debtor, was, at or before the filing of the debtor's petition, and is now justly and truly indebted to the State of California, as follows:

Per DE 914, #70032, attached:	
Unpaid contributions	$1,798.83
Accrued interest to 11-30-41	89.94
Penalty	179.88
DE 914	$2,068.65
Less penalty	179.88
Claim	$1,888.77

Plus additional interest on $1,798.83 at 1% per month, or fraction thereof, from 12-1-41 to date of payment.

4. That this claim is entitled to the Priority provided by Sec. 64a of the Bankruptcy Act:

5. That the due date for the said tax is past; that no part of the said tax has been paid except as above stated; that there are no set-offs or counter-claims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any

person, to his knowledge or belief, for the use or benefit of the State of California, had or received any manner of security for the said tax or interest or penalty whatever, except as follows:

CALIFORNIA EMPLOYMENT
COMMISSION
CHARLES J. ROSS

Subscribed and sworn to before me this 25th day of November, 1941.

[Seal] MAY KETLEY
Notary Public in and for the
County of Sacramento,
State of California.

Make all checks payable to Department of Employment, and mail attention Collection Unit, 1025 P Street, Sacramento, California.
DE 273 (Rev. 2) [8]

EXHIBIT C

In the United States District Court
Southern District of California
Central Division

No. 38,270-H Bkcy.

In the Matter of BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a Co-partnership,
Debtor.

ORDER PROVIDING THAT DEBTOR IS NOT

SUBJECT TO CALIFORNIA EMPLOYMENT COMMISSION FOR UNEMPLOYMENT TAXES.

The above-entitled matter having come on further to be heard on Monday, the 5th day of January, 1942, at the hour of 10 o'clock a. m., and notice of said hearing having been given to the California Employment Commission, and such notice being deemed by this Court to be sufficient, and it having been stipulated by the debtor, through its attorney, Charles Peckham; Charles T. Russell, individually, through his attorney Arthur H. Deibert; and the California Employment Commission—which said Commission has heretofore filed its claim herein for unemployment taxes and interest in the total amount of $1,888.77—through Earl Warren, Attorney General, and Samuel L. Gold, of counsel, that:

(1) The Debtor Co-partnership of Berlin and Russell Aircraft Machine and Manufacturing Company was formed on November 7, 1940.

(2) The payroll of the debtor from November 7, 1940, to December 31, 1940, was $2,220.66, and if any unemployment tax to the United States and to the State of California jointly was incurred by the Debtor during said period, said tax was in the amount of $66.62; [9] of which amount the State of California would be entitled to a sum not exceeding $59.96.

(3) That for the first quarter of the calendar

year 1941, said quarter ending March 31, 1941, the payroll of the Debtor was $42,400.17, and if any unemployment tax to the United States and to the State of California jointly was incurred by the debtor during the said period, said tax was in amount of $1,272.01; of which amount the State of California would be entitled to a sum not exceeding $1,144.80.

(4) That for the period April 1, 1941, to May 16, 1941, inclusive, (the latter date being the date on which the sale of certain of the assets of the Debtor to Intercontinent Aircraft Corporation became effective by order of this Court, since which time the Debtor has not had any employees) the payroll was $23,828.88, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of $714.87; of which amount the State of California would be entitled to a sum not exceeding $643.38.

(5) The Debtor did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts.

(6) From January 1, 1941, to May 16, 1941, inclusive, the Debtor employed 8 or more persons during each week day of that period, with the exception of holidays and some Saturdays.

(7) The Debtor has had no employees since cer-

tain of its assets were sold to Intercontinent Aircraft Corporation as of the close [10] of business on May 16, 1941.

And the above-entitled Court having heard the statements of counsel and having been fully advised in the premises, and Good Cause Appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that under the provisions of Section 9, Section 37 and Section 38 of the California Unemployment Insurance Act, the calendar year extending January 1 to December 31, inclusive, constitutes the taxable year.

It Is Further Ordered, Adjudged and Decreed that under the aforementioned provisions of the California Unemployment Insurance Act, a week constitutes a period of seven (7) days, beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year, only in the event that such day is one of the 7 days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Act means twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

It Is Further Ordered, Adjudged and Decreed

that since January 1, 1941, fell on a Wednesday, and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than twenty weeks within the calendar year of 1941.

It Is Further Ordered, Adjudged and Decreed that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment Commission [11] heretofore filed herein for unemployment tax, be, and the same is hereby denied.

Dated: this 26th day of January, 1942.

HARRY A. HOLLZER
Judge of the United States
District Court. [12]

EXHIBIT D

Earl Warren, Attorney General
John J. Dailey, Deputy
Maurice P. McCaffrey,
Glenn V. Walls,
Samuel L. Gold,
Of Counsel
1025 P Street
Sacramento, California
Attorneys for California Employment Commission

In the United States District Court
Southern District of California
Central Division
No. 38,270 H Bankruptcy

In the Matter of BERLIN and RUSSELL AIR-

CRAFT MACHINE and MANUFACTURING COMPANY, a copartnership,

Debtor.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Notice is hereby given that the California Employment Commission, an administrative agency of the State of California, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order entered in the above debtor proceedings on January 26, 1942, and from the whole of said order, which order provided that the above debtor is not subject to the California Unemployment Insurance Act and [13] denied the claim of said California Employment Commission for unemployment taxes.

EARL WARREN,
Attorney General
JOHN J. DAILEY,
Deputy
MAURICE P. McCAFFREY,
SAMUEL L. GOLD
GLENN V. WALLS,
Of Counsel
By /s/ SAMUEL L. GOLD
Attorneys for California Employment Commission
1025 P Street
Sacramento, California [14]

EXHIBIT E

Earl Warren, Attorney General
Maurice P. McCaffrey
Samuel L. Gold, Of Counsel
1025 P Street
Sacramento, California
Attorneys for California Employment Commission

In the United States District Court, Southern District of California, Central Division

No. 38,270-H

BANKRUPTCY

In the Matter of:

BERLIN and RUSSELL AIRCRAFT MACHINE and MANUFACTURING COMPANY, a co-partnership,

Debtor.

EXTENSION OF TIME TO FILE RECORD ON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

Good cause appearing therefor, it is hereby ordered that the California Employment Commission may have to April 30, 1942, to file the record on appeal to the Circuit Court of Appeals of the Ninth District.

Dated: 18th day of March, 1942.

/s/ HARRY A. HOLLZER,
Judge of the District Court. [15]

EXHIBIT F

Earl Warren, Attorney General
John J. Dailey, Deputy
Maurice P. McCaffrey and
Samuel L. Gold,
Of Counsel
1025 "P" Street
Sacramento, California
Attorneys for California Employment
Commission

In the United States District Court, Southern District of California, Central Division.

No. 38,270-H
BANKRUPTCY

In the Matter of:

BERLIN and RUSSELL AIRCRAFT MACHINE and MANUFACTURING COMPANY, a co-partnership,

Debtor.

EXTENSION OF TIME TO FILE RECORD ON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

Good cause appearing therefor, it is hereby ordered that the California Employment Commission may have to May 21, 1942, to file the record on appeal to the Circuit Court of Appeals of the Ninth District.

Dated: This 22nd day of April, 1942.

/s/ HARRY A. HOLLZER,
Judge of the District Court. [16]

EXHIBIT G

Earl Warren, Attorney General
John J. Dailey, Deputy
600 State Building, S. F.
Maurice P. McCaffrey
Glenn V. Walls, and
Samuel L. Gold, Of Counsel.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 38270-H

BANKRUPTCY

In the Matter of

BERLIN and RUSSELL AIRCRAFT MACHINE and MANUFACTURING COMPANY, a co-partnership,

Debtor,

CALIFORNIA EMPLOYMENT COMMISSION,

Appellant.

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL

Good cause appearing therefor, it is hereby ordered that the California Employment Commission may have to and including the 22nd day of June 1942, within which to file the record on appeal in the above entitled matter to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 15th day of May, 1942.

FRANCIS A. GARRECHT,
Judge of the United States Circuit Court
of Appeals for the Ninth Circuit.

[Endorsed]: Order, etc. Filed May 14, 1942. Paul P. O'Brien, Clerk. [17]

[Title of Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 17, inclusive contains the original Agreed Statement of Case which constitutes the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to $3.05 which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 20th day of June, A. D. 1942.

[Seal] EDMUND L. SMITH,
Clerk.
By THEODORE HOCKE, Deputy. [18]

[Endorsed]: No. 10173. United States Circuit Court of Appeals for the Ninth Circuit. In the matter of Berlin and Russel Aircraft Machine and Manufacturing Company, a copartnership, California Employment Commission, an administrative agency of the State of California, Appellant, vs. Berlin and Russell Aircraft Machine and Manufacturing Company, a co-partnership of H. M. Berlin and C. T. Russell, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States

for the Southern District of California, Central Division.

Filed June 22, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 38270-H

IN BANKRUPTCY

CALIFORNIA EMPLOYMENT COMMISSION,
Appellant,

vs.

BERLIN and RUSSELL AIRCRAFT MACHINE and MANUFACTURING COMPANY, a co-partnership,
Debtor-Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF PRINTED RECORD

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

You are hereby notified that the appellant adopts and here incorporates by reference as the Statement of Points on which it is intended to rely on appeal the appellant's statement of points appearing in the Agreed Statement of case heretofore transmitted to this court as the record on appeal.

You are further notified that the appellant designates for printing the entire Agreed Statement of Case, and the exhibits, papers or documents appended thereto, heretofore submitted to this court as the record on appeal herein.

EARL WARREN,
Attorney General of the State
of California,
JOHN J. DAILEY, Deputy
MAURICE P. McCAFFREY,
SAMUEL L. GOLD, and
GLENN V. WALLS, Of Counsel.

By GLENN V. WALLS,
Attorneys for Appellant.

[Title of Court and Cause.]

State of California,
County of Sacramento.—ss.

AFFIDAVIT OF SERVICE BY MAIL

Anna Rose Shalag, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the City of Sacramento, County of Sacramento, State of California; that affiant is over the age of 18 years and is not a party to the within and above entitled cause; that affiant's business address is 1025 P Street, in the City of Sacramento, County of Sacramento, State of California.

That on the 19th day of June, 1942, affiant served

the within Appellant's Statement of Points and Designation of Printed Record on the appellee in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said appellee, at the office address of said attorney as follows:

Charles Peckham, Esq.
Suite 710 Title Insurance Bldg.
433 S. Spring Street
Los Angeles, California

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Sacramento, California, where is located the office of the attorneys for the appellant, California Employment Commission, for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

ANNA ROSE SHALAG,
Affiant.

Subscribed and sworn to before me this 19th day of June, 1942.

[Seal] AMY B. WARNER,
Notary Public in and for the County of Sacramento,
State of California.

No. 10173

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

CALIFORNIA EMPLOYMENT COMMISSION, an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. Berlin and C. T. Russell,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLANT

MAURICE P. McCAFFREY,
SAMUEL L. GOLD,
GLENN V. WALLS,
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Sacramento, California
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EARL WARREN,
Attorney General of the State of California,

JOHN J. DAILEY,
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San Francisco, Calif.
Attorneys for Appellant.

15941 *printed in* CALIFORNIA STATE PRINTING OFFICE
SACRAMENTO, 1942 GEORGE H. MOORE, STATE PRINTER

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IN THE

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IN AND FOR THE

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Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. Berlin and C. T. Russell,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLANT

JURISDICTION

This is an appeal from an Order of the District Court of the United States for the Southern District of California, Central Division, of January 26, 1942 (R. 10-14), wherein it was adjudged that the

debtor, appellee herein, was not subject to the California Unemployment Insurance Act and that the claim of the appellant herein for unemployment insurance contributions or taxes in the amount of $1,798.83, plus interest, was denied.

On April 3, 1941, the debtor-appellee filed in the District Court a petition under Chapter XI of the Federal Bankruptcy Act as amended 1938 (R. 2, 3). The District Court granted this petition by order filed April 4, 1941. On November 25, 1941, the California Employment Commission filed against the debtor in the District Court its proof of priority claim for the taxes and interest here involved. The jurisdiction of the District Court to pass on such claim is found in Sections 2a(2) and 351 of the Federal Bankruptcy Act as amended 1938. The order of the District Court was filed January 26, 1942, and notice of appeal was filed on February 20, 1942 (R. 4, 5). The case comes to this Court pursuant to the provisions of Section 128(c) of the Judicial Code and Section 24 of the Federal Bankruptcy Act as amended 1938. The appellant has filed an appeal bond in the sum of $250.00.

STATEMENT OF THE CASE

The facts are as stated in the agreed statement of the case (R. 2-7).

The California Employment Commission, appellant herein, was at all times involved herein and is

now the duly appointed and acting administrative agency of the State of California created by and exercising the powers conferred upon it by the public statute of the State of California known as Chapter 352 of the Statutes of 1935, as amended (Deering Act No. 8780d, as amended), hereinafter referred to as the California Unemployment Insurance Act (R. 2).

The debtor and appellee is a copartnership which was formed and commenced business operations in the State of California on November 7, 1941, having its principal place of business in the County of Los Angeles (R. 2). On April 3, 1941, the appellee filed in the United States District Court for the Southern District of California its petition for an arrangement under Chapter XI of the Federal Bankruptcy Act. The petition was granted the following day. Pursuant to the order or permission of the Court, the appellee continued in possession of its business and continued to operate the same until May 16, 1941, on which day all operations ceased (R. 2-3).

During the period from January 1, 1941, to May 16, 1941, the appellee had in its employ in the State of California eight or more employees on each day of each week, with the exception of holidays and some Saturdays. After May 16, 1941, the appellee had no employees (R. 3). During the period from January 1, 1941, to March 31, 1941, appellee's payroll amounted to $42,400.17. During the period

from April 1, 1941, to May 16, 1941, appellee's payroll amounted to $23,828.88 (R. 3).

The appellee filed no returns under the California Unemployment Insurance Act (R. 12).

On November 25, 1941, the appellant filed its proof of priority claim for unemployment taxes in the amount of $1,798.83, plus interest (R. 3-4), for the period from January 1, 1941, to May 16, 1941. The appellee opposed payment of said claim on the ground that no taxes were owed (R. 4). After a hearing in the District Court, an order was entered holding that the appellee did not owe said unemployment taxes (R. 4-5). The appellant has appealed from said order.

On the basis of the stipulated payroll of $66,229.05 for the period from January 1, 1941, to May 16, 1941, unemployment taxes, if any, due the appellant amount to $1,788.18, which is some $10.65 less than the amount set forth in the proof of priority claim.

THE QUESTION INVOLVED

Did the appellee, by having in its employ eight or more employees on each week day during the period from January 1, 1941, to May 16, 1941, qualify as an "employer" as that term is defined in Section 9(a) of the California Unemployment Insurance Act?

STATUTES INVOLVED

Section 9(a) of the California Unemployment Insurance Act reads as follows:

"Sec. 9. 'Employer' means:

(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day;"

Section 37 of the California Unemployment Insurance Act reads as follows:

"Sec. 37. (a) On and after January 1, 1936, contributions to the unemployment fund shall accrue and become payable by every employer for each calendar year in which he is subject to this act, with respect to wages paid for employment occurring during the calendar year 1936 and upon wages payable during subsequent calendar years; provided, however, that if and when the taxes payable under Title IX of the

Federal Social Security Act (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) become payable on a basis of 'wages paid' rather than 'wages payable', then as of that time the contributions due hereunder shall thereafter be upon wages paid. Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ.

(b) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent."

Section 38 of the California Unemployment Insurance Act reads as follows:

"Sec. 38. Every such employer shall pay into the unemployment fund contributions equal to the following amounts:

(a) During the year 1936, with respect to payments of wages made during that year, ninety one-hundredths per cent of all wages paid by him in employment subject to this act;

(b) For the year 1937, one and eighty one-hundredths per cent of all wages payable by him during such year with respect to employment subject to this act;

(c) For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages

with respect to which contributions become due and payable for employment subject to this act.

If, when, and during such time as the excise tax required of employers by section 901 of the Social Security Act (or the corresponding provisions of the Internal Revenue Code or any other Federal act into which such tax now is or hereafter may be incorporated) is payable only upon $3,000 or less wages earned in any calendar year by any individual from any single employer as defined in section 907 of that act, (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) the contributions required to be paid by every employer by subsection (c) hereof shall be payable only upon $3,000 or less of wages earned in any calendar year by any worker employed by such employer."

Section 90 of the California Unemployment Insurance Act reads in part as follows:

"Sec. 90. The commission, in addition to all duties imposed and powers granted or implied by the provisions of this act:

(a) Shall adopt, amend or rescind general and special rules for the administration of this act only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective ten days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective ten days after mailing

notice thereof to the last known address of the individuals or concerns affected thereby.

(b) Shall adopt, amend or rescind regulations for the administration of this act, which shall become effective in the manner and at the time prescribed by the commission. Rules or regulations heretofore adopted shall continue in effect until amended or rescinded in accordance with the procedure prescribed by this section."

Rule 12.1 of the California Employment Commission, as the same was in effect during the period involved herein, reads as follows:

"Rule 12.1—Term Week Defined. The term 'week,' unless the wording clearly otherwise requires, whenever used in the Act, Rules and Regulations, forms, procedures and instructions thereon and all other official pronouncements of the Department of Employment, shall mean the period of seven consecutive days commencing Sunday and ending Saturday.

This revised rule shall become effective September 29, 1940, provided that an employing unit shall not become an employer subject to the Act solely by reason of its employment of four or more individuals upon said effective date if such employing unit has not, prior to said effective date, employed four or more persons in each of more than nineteen 'weeks.'

(Effective Date: September 29, 1940)"

STATEMENT OF POINTS TO BE URGED

1. The District Court erred in refusing to hold that the appellee was an "employer" during the

year 1941 within the meaning of Section 9(a) of the California Unemployment Insurance Act.

2. The District Court erred in disallowing the priority claim for unemployment taxes filed on behalf of the appellant.

ARGUMENT

I

The Appellee Was An "Employer" Within the Meaning of Section 9(a) of the California Unemployment Insurance Act for the Year 1941.

Under Section 9(a) of the California Unemployment Insurance Act, the appellee qualifies as an "employer" for the year 1941: (a) if it had four or more employees in 1941 (b) for some portion of a day (c) in each of twenty different weeks.

Apparently no dispute exists as to the meaning of the term "week." Under Rule 12.1 of the California Employment Commission, the term "week" corresponds to the calendar week, commencing Sunday and ending Saturday. The same definition was adopted by the District Court (R. 13).

The period commencing Sunday, January 5, 1941, and ending Saturday, May 10, 1941, includes 18 weeks. It is admitted that appellee had four or more employees on some day in each of those weeks. On January 2 and 3, 1941, it is agreed that the appellee had four or more employees. These days certainly were in a different week from the following 18 weeks. It is agreed that appellee had four or

more employees on May 12, 13, 14, 15, and 16, 1941. Certainly these days were in a different week from the preceding 18 weeks. Every day must be in some week. The additional days at each end of, but not within, the 18 week period must have been in two additional weeks. Consequently there were 20 days, each in a different week, during which the appellee had four or more employees in 1941.

It was contended by the appellee, and so decided by the District Court, that each of the 20 days must fall in a different complete calendar week within the year 1941. It is submitted that such a construction adds an entirely new factor not found in the definition in Section 9(a). The statute does not, either directly or by implication, require the 20 days to fall in 20 different full calendar weeks within the calendar year. If the Legislature had so intended, it very easily could have said so.

So far as we have been able to find, the only reported case bearing upon the point is *Garage Service Corporation* v. *Hassett,* 42 F. Supp. 791, decided January 12, 1942, by the United States District Court for the District of Massachusetts. That was an action to recover social security taxes, the question being whether or not the plaintiff was an "employer" for 1937 within the meaning of Section 907(a) of the Social Security Act, 42 U. S. C. A. Par. 1107(a). That section provided:

> "The term 'employer' does not include any person unless on each of some twenty days dur-

ing the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more."

From January 1, 1937 to May 11, 1937, the plaintiff employed eight or more employees. January 1 and 2 fell on a Friday and a Saturday. May 11 fell on a Tuesday. The period January 3 to May 8 included 18 full calendar weeks. The plaintiff raised the same argument advanced by the appellant herein. In rejecting this argument, the District Court stated (42 F. Supp. at 792):

"* * * I cannot agree with the plaintiff's contention that the calendar week from which a day is taken must fall within the taxable year. The statute merely requires employment on a day within the taxable year. Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. The statute omits the words 'during the taxable year' after the words 'calendar week.' I can think of no reason to infer that Congress meant them to be implied. If the intention was that the statute should be construed as the taxpayer argues, it is apparent that Congress could have assured comprehension of their meaning by inserting the phrase 'during the taxable year' after 'calendar week' instead of after 'days.' It seems clear to me that the taxpayer was an 'employer' within the statutory definition."

CONCLUSION

The decision of the District Court, holding that the appellee was not an "employer" under Section 9(a) of the California Unemployment Insurance Act and disallowing appellant's claim, was erroneous and should be reversed.

Respectfully submitted.

EARL WARREN,
Attorney General of the
State of California,

JOHN J. DAILEY,
Deputy,

MAURICE P. McCAFFREY,

SAMUEL L. GOLD, and

GLENN V. WALLS,
Of Counsel

Attorneys for Appellant.

No. 10173.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA EMPLOYMENT COMMISSION, an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. Berlin and C. T. Russell,

Appellee.

BRIEF FOR APPELLEE.

ARTHUR H. DEIBERT,
1104 Pacific Mutual Building, Los Angeles,
Attorney for Appellee.

Parker & Baird Company, Law Printers, Los Angeles

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. Berlin and C. T. Russell,

Appellee.

BRIEF FOR APPELLEE.

Opinion Below.

The previous opinion in this case is the ORDER PROVIDING THAT DEBTOR IS NOT SUBJECT TO CALIFORNIA EMPLOYMENT COMMISSION FOR UNEMPLOYMENT TAXES. [R. 10-14.]

Jurisdiction.

This appeal involves California Unemployment Insurance Taxes claimed by the State of California for the year 1941, which claim was denied by the District Court of the United States for the Southern District of California, Central Division, by Order of January 26, 1942. [R. 10-14.] On April 3, 1940, the Debtor, Appellee herein, filed in the United States District Court, a Petition under Chapter XI of the Federal Bankruptcy Act as amended by

the Act of June 22, 1938. By Order dated April 4, 1941, the District Court granted said Petition. On November 25, 1941, the California Employment Commission filed its proof of claim in the District Court for the taxes and interest here involved. The jurisdiction of the District Court to pass on such claim is found in Sections 2(a) (2) and 351 of the Federal Bankruptcy Act as amended in 1938. The Order of the District Court was filed January 26, 1942, and Notice of Appeal was filed on February 20, 1942. [R. 4-5.] The case is before this Court pursuant to the provisions of Section 128(c) of the Judicial Code and Section 24 of the Federal Bankruptcy Act as amended in 1938.

Question Presented.

The sole issue is whether the Appellee is an "Employer" within the definition of that term in Section 9(a) of the California Unemployment Insurance Act, the determination of such question being dependent on whether the Appellee employed four or more individuals on each of some twenty days during the calendar year 1941, each day being in a different week. During 1941 the Appellee employed four or more persons from January 2 to May 16, inclusive, but employed none after the latter date.

Errata.

On page 2 of the Record in the 5th line from the bottom, the date November 7, 1941, should read November 7, 1940. Likewise on page 3 of Appellant's Brief, in the 11th line, November 7, 1941, should read November 7, 1940.

Statutes.

Section 9 of the California Act, Chapter 352, Laws of 1935, as amended, provides in part as follows:

> "Sec. 9. Employer means:
>
> "(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, *in each of twenty different weeks,* whether or not such weeks are or were consecutive, *has within the current calendar year* or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day;" (Italics supplied.)

Sections 37 and 38 of the California Act relate to contributions and, so far as pertinent, provide as follows:

> "Sec. 37(a) On and after January 1, 1936, contributions to the unemployment fund shall accrue and become payable by every employer *for each calendar year* in which he is subject to this act, with respect to wages paid for employment occurring during the calendar year 1937 and upon wages payable during subsequent calendar years; provided, however, that if and when the taxes payable under Title IX of the Federal Social Security Act (or the corresponding provisions of the Internal Revenue Code, or any other Federal Act into which such tax now is or hereafter

may be incorporated) become payable on a basis of 'wages paid' rather than 'wages payable', then as of that time the contributions due hereunder shall thereafter be upon wages paid. Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ." (Italics supplied.)

"Sec. 38. Every such employer shall pay into the employment fund contributions equal to the following amounts:

* * * * * * * *

"(c) For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages with respect to which contributions become due and payable for employment subject to this act.

"If, when, and during such time as the excise tax required of employers by Section 901 of the Social Security Act (or the corresponding provisions of the Internal Revenue Code or any other Federal act into which such tax now is or hereafter may be incorporated) is payable only upon $3,000 or less wages earned in any calendar year by any individual from any single employer as defined in section 907 of that act, (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) the contributions required to be paid by every employer by subsection (c) hereof shall be payable only upon $3,000 or less of wages earned in any calendar year by any worker employed by such employer."

Statement.

The facts contained in the stipulation of facts in the trial court are set forth in the Order of the District Court that the Appellee is not subject to the California Employment Taxes, in paragraphs numbered (1) to (7) [R. 11-13]. The Appellee is a copartnership organized November 7, 1940. During the period from January 1, 1941, to May 16, 1941, inclusive, Appellee employed eight or more persons on each week day with the exception of holidays and some Saturdays. The Appellee had no employees after May 16, 1941, when it ceased to do business. It did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts. Its payroll for the first quarter of the calendar year 1941 ending March 31, 1941, was $42,400.17, and for the period April 1, 1941 to May 16, 1941, inclusive, its payroll was $23,828.88.

On April 3, 1941, Appellee filed in the United States District Court for the Southern District of California, a Petition for an arrangement under Chapter XI of the Federal Bankruptcy Act, which Petition was granted by order of said Court on April 4, 1941. On November 25, 1941, Appellant filed its proof of claim for California Unemployment taxes in the amount of $1,798.83 plus interest [R. 3-4] for the period January 1 to May 16, 1941. Payment of said claim was opposed by Appellee on the ground that it did not owe any of said taxes. [R. 10-13.]

After a hearing in the District Court an order was entered holding that under the provisions of Section 9. Section 37 and Section 38 of the California Unemployment Insurance Act, the calendar year extending January

1 to December 31, inclusive, constitutes the taxable year; that a week constitutes a period of 7 days beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year, only in the event that such day is one of the 7 days of one and the same week falling entirely within one and the same calendar year and that the twenty-weeks period specified in said Act means 20 calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year; and that since January 1, 1941, fell on a Wednesday and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than 20 weeks within the calendar year of 1941; and that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment Commission heretofore filed herein for unemployment tax "be and the same is hereby denied." [R. 13-14.]

Summary of Argument.

Appellee is not subject to the California Unemployment Insurance Act for the reason that it did not employ four or more persons on each of some twenty days during the year 1941, each day being in a different calendar week, inasmuch as the "different weeks" specified in Section 9(a) of the California Unemployment Insurance Act mean full weeks of 7 days each, each week beginning on Sunday morning and ending the following Saturday night, which different weeks must be wholly within one and the same calendar year.

ARGUMENT.

Appellee Did Not Employ Four or More Persons on Each of Some 20 Days During the Calendar Year 1941, in Different Calendar Weeks Wholly Within That Calendar Year, and Was Therefore Not an Employer Under the California Unemployment Insurance Act.

In its brief (page 9), Appellant states that,

> "Apparently no dispute exists as to the meaning of the term 'week.' Under Rule 12.1 of the California Unemployment Commission the term 'week' corresponds to the calendar week, commencing Sunday and ending Saturday. The same definition was adopted by the District Court. [R. 13.]"

In that definition Appellee concurs.

Appellee claims, and it has been upheld by the United States District Court, that during the period January 1, 1941, to May 16, 1941, inclusive, there were not 20 days within the calendar year 1941, each day being in a different calendar week, which met the employment requirements of the Act. The Court below agreed with Appellee's contention that under the provisions of the California Unemployment Insurance Act, a day may be counted as being one of the 20 days provided in Section 9(a) of such Act only in the event that such day is one of 7 days of one and the same week falling *wholly* within one and the same calendar year, and that the 20 weeks so specified mean 20 calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

The paragraph last quoted from Section 38 of the California Act makes it clear that the Legislature was dealing only with wages paid by an employer within a calendar year, and that the calendar year is therefore necessarily the sole basis for all computations of both wages and time of employment in order to determine the liability of any employer for such tax. Section 38, *supra,* speaks of "wages earned in any *calendar* year." It is obvious, therefore, that the Legislature selected the calendar year beginning January 1 and ending December 31, as the taxable year, and as the exclusive period of time for which the wages paid by an employer to an employee were to be so taxed, as well as the period for determining the question whether an employer "has within the *current* calendar year" and "in each of 20 different weeks," four or more individuals in employment, and that each of such 20 days must therefore be in a different complete calendar week during the same calendar year.

Consequently, the fixing of the current calendar year by the Legislature as the taxable year, and as the period for which the tax is to be levied upon the total wages paid by an employer to his employees, would definitely seem to preclude the use of any number of days in either a preceding or succeeding calendar year for the purpose of determining either (1) the statutory period of 20 different weeks within each calendar year, or (2) wages paid in the calendar year during which such tax liability, if any, is incurred.

It is a matter of common knowledge that taxation, both State and Federal, is normally on an annual basis and that a taxable year is a calendar year unless otherwise specified. It is noteworthy, however, that in the Act

imposing an unemployment tax the Legislature left no doubt on this point by specifically confining the application of the tax to the "calendar year," and by assessing in Section 38(c):

> "For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages with respect to which contributions become due and payable for unemployment subject to this Act."

Obviously, therefore, the State cannot include any period of time in either a prior or a succeeding year for the purpose of determining the wages upon which the tax shall apply, and by the same token it cannot go back to a prior year or forward to a succeeding year for the purpose of computing a calendar week to make up one or more of the 20 different weeks with respect to employment "within the current calendar year."

Attention is further invited to the fact that in Section 9(a) of the California Unemployment Insurance Act, after providing for employment of four or more persons on a day in each of 20 different weeks, that section continues "whether or not such weeks are or were consecutive." As has already been shown, a calendar week consists of 7 full days beginning Sunday morning and ending the following Saturday night, and in using the term, "20 different weeks," which Appellant admits means calendar weeks, the Legislature must have had in mind full calendar weeks and not partial calendar weeks. Otherwise, it would have been impossible to define a measure of time as a "different week" in providing that the 20 weeks need not be consecutive. In view of the fact that the Legislature made no provision for a partial calendar week, we believe it necessarily follows that a calendar week with-

in the current calendar year means a full and complete calendar week of 7 successive days wholly within each separate calendar year. The District Court has so held.

The fixing of 20 different calendar weeks and four or more employees as criteria for the purpose of determining who is an employer within the meaning of the California Unemployment Insurance Act was, of course, purely arbitrary. The Legislature could have fixed either a greater or lesser number of weeks or employees, as such determination is properly within its province. Therefore, if an employer has in his employ four or more individuals on one day of each of 19 different calendar weeks in the year, he does not fall within the definition of an employer and is not subject to the unemployment tax. Employment in each of 20 different weeks in the year is mandatory.

This contention is illustrated and confirmed by the decision of the Supreme Court of the United States in *Carmichael v. Southern Coal Co.,* 301 U. S. 495, where the Court had before it for decision the question whether the Unemployment Compensation Act of Alabama (one of the group of laws enacted by a number of the states following the lead and pattern of the Federal Social Security Act which levied a Federal unemployment tax) was constitutional.

In holding the Alabama law valid the Court, speaking through Mr. Justice Stone, pointed out that the said Act:

> "* * * sets up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by the Act. These employers include all who employ eight or more persons for twenty or more weeks *in the year,* Sec.

2(f), except those engaged in certain specified employments.

* * * * * * * *

"(a) Exclusion of Employers of Less than Eight. Distinctions in degree, stated in terms of differences in number, have often been the target of attack, see Booth v. Indiana, 237 U. S. 391, 397, 59 L. ed. 1011, 1017, 35 S. Ct. 617. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not." (Italics supplied.)

The Court thus lent special emphasis to the fact that the number of employees, the number of days, and the number of weeks specified in such legislation are entirely arbitrary, but by the same token the lines of demarcation so laid down must be strictly observed no less by the State than by taxpayers.

Continuing its discussion of exemption of particular classes of employers the Court in the *Carmichael* case made the following significant pronouncement:

"Similarly, the legislature is free to aid a depressed industry such as shipping. The exemption of busi-

ness operating for *less than twenty weeks in the year* may rest upon similar reasons, or upon the desire to encourage seasonal or unstable industries." (Italics supplied.)

The foregoing quotation would seem to be an explicit approval of our contention that the tax in question is levied only upon those employers who have four or more employees for *at least* 20 *different* weeks *"within the current calendar year."* The context of the quotation clearly shows that the Court must have had in mind 20 full calendar weeks *"in the year."*

January 1, 1941, which was a holiday and on which day the Appellee did not have four or more employees engaged in work, fell on Wednesday. Even including that day, however, during the period from January 1, 1941, to May 16, 1941, inclusive, the latter being the last day on which Appellee had any employees (and then went out of business) there were only 18 full calendar weeks of 7 successive days each, as the first 4 days of January did not constitute a calendar week, nor did the 6-day period from Sunday, May 11, to Friday, May 16, 1941, the last day on which the Appellee had any employees, constitute a calendar week.

Appellant relies upon the decision of the United States District Court for the District of Massachusetts in *Garage Service Corporation v. Hassett,* 42 Fed. Supp. 791, which, with the decision in favor of Appellee's contention by the District Court in the instant case, apparently are the only two decisions by the courts on the question involved, with the exception of the *Carmichael* case, *supra.* In the *Garage Service Corporation* case, the Court disagreed with the plaintiff's contention that the calendar week from which

a day is taken must fall wholly within the taxable year, saying,

> "* * * Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. * * *"

If that Court is correct in the statement just quoted, there is not only a departure from the basic scheme of both Federal and State taxation on an annual basis, which is now so firmly established as to require no citations of authority, but it is also a denial of the specific intent of Congress with reference to the Federal Unemployment Tax Act, which deals with wages paid during the calendar year and with the calendar year in the computation of time. The pattern of the Federal Act was closely followed by the states having their own unemployment tax or insurance acts. Bearing in mind, therefore, the fact, which we do not believe can be successfully controverted, that the plan of both the Federal Unemployment Tax Act and the California Unemployment Insurance Act is based entirely upon the calendar year, the error into which we believe the Massachusetts Court fell in the *Garage Service Corporation* case is apparent and can be demonstrated by visualizing the situation which would result from the application of that Court's theory. For example, in 1940, December 29, 30, and 31 fell respectively on Sunday, Monday and Tuesday, while in 1941, January 1, 2, 3 and 4 fell respectively on Wednesday, Thursday, Friday and Saturday. Consequently there were two normal working days in 1940 and three (barring January 1, a holiday) in 1941 during the 7-day period from Sunday, December 29, 1940 to Saturday, January 4, 1941,

which constitutes a calendar week. Under the theory of the Massachusetts Court, therefore, it would be possible to count one day, either December 30 or 31 in 1940, for the purpose of making up the statutory 20-week period within the calendar year 1940, assuming that there were already 19 calendar weeks of employment in that year, and at the same time count either January 2, 3 or 4, 1941, for the purpose of making up the 20-week period within the year 1941, likewise assuming 19 calendar weeks of employment in that year, thereby using the *same* calendar week of December 29, 1940 to January 4, 1941, *twice,* once in 1940 and again in 1941, for the purpose of making an employer liable to the unemployment tax, when such computation is plainly and specifically prohibited by Section 9(a) of the California Unemployment Insurance Act which requires employment on some day, "in each of 20 *different* weeks" and "within the current calendar year." In the *Garage Service Corporation* case the Court was dealing with the Federal Unemployment Tax Act, which likewise contains in Section 1607(a) a requirement that in computing "each of some 20 days during the taxable year" each day must be "in a *different* calendar week." It seems clear beyond question that the same calendar week cannot be used in each of two calendar years for the purpose of finding 20 days of employment in each calendar year in *different* calendar weeks.

Again, if the State's theory is correct, but such week beginning December 29, 1940, and ending January 4, 1941, should be counted as only one of the 20 *different*

weeks, the question arises, in which year, 1940 or 1941, may it be counted? Also, who shall elect in which year it shall be used, the State or the employer? The fact is that there is no right of election given to the State, the Federal Government, or the employer, in either the State or Federal law, and without such right no such choice of years is available to either party.

The difficulties and inconsistencies above pointed out demonstrate the invalidity of Appellant's assertion that one of the first 4 days in January, 1941, may be counted to provide one of the 20 *different* weeks in 1941. Without it we submit that Appellant's case must fail, inasmuch as there were only 18 full calendar *different* weeks meeting the employment requirements in this case in 1941. Neither the 4 days from January 1 to January 4, inclusive, nor the six days from Sunday, May 11, to Friday, May 16, constituted statutory calendar weeks.

If it be objected that such interpretation exempts certain employers from the tax, a complete answer is found in the decision of the Supreme Court of the United States in the *Carmichael* case, *supra,* in the language of Mr. Justice Stone who, referring to the arbitrary distinction between those employers who have only seven employees and those who have eight, remarked that this is the type of distinction which the law is often called upon to make; that it is only a difference in numbers which marks the moment when day ends and night begins, and that it separates large incomes which are taxed from the smaller

ones which are exempt, "as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not."

The rule for which the State contends would, by using partial calendar weeks at the beginning and end of each year, result in there being 54 weeks in many years instead of the usual 52; a somewhat startling phenomenon.

It would seem that the terms "20 different weeks" and "within the current calendar year" as found in Section 9(a) of the California Unemployment Insurance Act are so plain and explicit in their meaning that they should not be misunderstood or misinterpreted. In that connection the rule of *United States v. Merriam,* 263 U. S. 179, 68 L. Ed. 240 is pertinent:

> "* * * in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. * * *"

In its Brief, Appellant states that the statute, Section 9(a), does not, either directly or by implication, require the 20 days to fall in 20 different full calendar weeks within the calendar year. We respectfully submit that not only by implication but directly, Section 9(a) does require the 20 days to fall in 20 different full calendar weeks within the calendar year, for it uses the terms "in each of 20 different weeks" and, speaking of employment, "within the current calendar year."

It appears, furthermore, that our contentions in this respect are upheld by the State's own administrative rulings. The following are excerpts from Codified Interpretative Opinions under the California Act:

Opinion No. 2009-02, March 10, 1941:

> "Section 9(a) of the Act as amended effective August 27, 1939, provides in part that a subject employer (prior to January 1, 1938) was 'any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals * * *.' Since the 'M' Company had the requisite employment experience; i. e., eight or more individuals in employment on some portion of a day *in each of twenty different weeks during the preceding calendar year* (1936) it fell squarely within the provisions of amended Section 9(a) and therefore became subject to the Act on the effective date of the section; i. e., August 27, 1937." (Italics supplied.)

Opinion No. 5011-01, February 7, 1941:

> "*Since the calendar year is the unit or period for the determining of contribution liability,* only the net wages for the year are properly taxable as provided by Section 11(b) and Rule 11.6. To arrive at a net wage for the year all business expenses properly deductible which are incurred during the calendar year may be deducted from the earnings for the entire year. Thus, where business expenses exceed earnings in one calendar quarter these expenses may be carried into a subsequent calendar quarter and deducted

from the earnings during that quarter. This procedure may be followed until the expenses are exhausted or *until the final quarter of the year has been reached,* whichever occurs first. The $50.00 excess in expenses incurred by 'S' during the first quarter of the year may be deducted from the $100.00 in net earnings realized in the second quarter, and the reports filed by 'M' Company will show only $50.00 net earnings for the second quarter.

"Where the final quarter of the calendar year shows an excess of expenses over earnings, *this excess may not be carried into the next calendar year.* However, if net wages have been reported for prior calendar quarters in the same calendar year, an adjustment may be made and a credit granted the employer for an overpayment. In making this adjustment, the expenses should be prorated among the various quarters in which net earnings have been reported." (Italics supplied.)

Both of these rulings under the California Act show clearly that the State of California has made the calendar year the *exclusive* unit or period of time for determining the liability of an employer under the Unemployment Insurance Act. The first opinion cited refers specifically to "some portion of a day in each of 20 different weeks during the preceding calendar year." Inasmuch as a week is admittedly a full period of 7 successive days, the State recognized the necessity of there being employment on some portion of a day in each of 20 different calendar weeks which fell within the calendar year.

The second opinion above quoted recognizes the exclusiveness of the calendar year as the unit for the compu-

tation of both time and wages when it says that any excess of expenses over earnings "may not be carried into the next calendar year." Clearly the line of demarcation must be sharply drawn at the beginning and end of a calendar year for the computation of both wages and time.

We again desire to emphasize the fact that to permit a partial calendar week at the beginning or end of a calendar year to be counted as one of the 20 different calendar weeks, would allow the same calendar week to be used twice, once in each of two successive years, and would completely destroy the whole fabric and intent of Section 9(a) of the California Unemployment Insurance Act, which refers to "each of 20 different weeks," with reference to employment "within the current calendar year."

Conclusion.

The decision of the Federal District Court in this case is correct and should be affirmed.

Respectfully submitted,

ARTHUR H. DEIBERT,
Attorney for Appellee.

No. 10173

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

CALIFORNIA EMPLOYMENT COMMISSION, an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. BERLIN and C. T. RUSSELL,

Appellee.

Upon Appeal From the District Court of The United States for the Southern District of California, Central Division

REPLY BRIEF FOR THE APPELLANT

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16860 *printed in* CALIFORNIA STATE PRINTING OFFICE
SACRAMENTO, 1942 GEORGE H. MOORE, STATE PRINTER

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Appellee.

Upon Appeal From the District Court of The United States for the Southern District of California, Central Division

REPLY BRIEF FOR THE APPELLANT

JURISDICTION

This matter has been covered in the opening brief for the appellant and since there is no dispute between the parties as to this question, it would serve no purpose to repeat the statements therein made at this time.

STATEMENT OF THE CASE

The agreed statement of the case has been set forth in the opening brief for the appellant and since there is no dispute between the parties as to the facts in this case, it would serve no purpose to repeat them at this time.

QUESTION INVOLVED

Did the appellee, by having in its employ eight or more employees on each week during the period from January 1, 1941, to May 16, 1941, qualify as an "employer" as that term is defined in Section 9(a) of the California Unemployment Insurance Act?

STATUTES INVOLVED

The statutes involved, namely, Section 9(a), Section 37, Section 38, and Section 90 of the California Unemployment Insurance Act, have been set forth in the opening brief for the appellant and it would serve no purpose to repeat them at this time.

STATEMENT OF POINTS TO BE URGED

The appellee was an "employer" during the year 1941 within the meaning of the provisions of Section 9(a) of the California Unemployment Insurance Act.

ARGUMENT

I

THE APPELLEE WAS AN "EMPLOYER" WITHIN THE MEANING OF THE PROVISIONS OF SECTION 9(a) OF THE CALIFORNIA UNEMPLOYMENT INSURANCE ACT FOR THE YEAR 1941

Under Section 9(a) of the California Unemployment Insurance Act, the appellee qualified as an "employer" for the year 1941 if for *some portion* of a day in each of twenty *different* weeks *within the calendar* year it had four or more individuals in its employ.

The period commencing Sunday, January 5, 1941, and ending Saturday, May 10, 1941, includes 18 weeks. It is admitted that appellee had four or more employees on some day in each of those weeks. On January 2 and 3, 1941, it is agreed that the appellee had four or more employees. These days certainly were in a different week from the following 18 weeks. It is agreed that appellee had four or more employees on May 12, 13, 14, 15, and 16, 1941. Certainly these days were in a different week from the preceding 18 weeks. Every day must be in some week. The additional days at each end of, but not within, the 18 week period must have been in two additional weeks. Consequently there were 20 days, each in a different week, during which the appellee had four or more employees in 1941.

It was contended by the appellee, and so decided by the District court, that each of the 20 days must fall in a different *complete calendar* week within the year 1941. It is submitted that such a construction adds an entirely new factor not found in the definition in Section 9(a). The statute does not, either directly or by implication, require the 20 days to fall in 20 different full calendar weeks within the calendar year. If the Legislature had so intended, it very easily could have said so. In fact, the failure of the Legislature to prescribe that the 20 days in a calendar year must fall within 20 *complete calendar weeks,* indicates a definite legislative intent that an employing unit is an employer if it has four or more individuals in its employ on 20 days in the calendar year, each day falling in a different week, irrespective of how many days there are in such week.

To support its contentions, the appellee stresses the language of that portion of Section 9(a) which states "in each of 20 different weeks" and "within the current calendar year", completely ignoring however that portion of the section which is in reality the controlling portion, namely, "for some portion of a day."

As the appellee so aptly states the "Legislature could have fixed either a greater or lesser number of weeks or employees, as such determination is properly within its province." (Page 10, Brief for Appellee.) However, "by the same token the lines

of demarcation so laid down (by the Legislature) must be strictly observed * * *." (Page 11, Brief for Appellee.)

Here the Act nowhere prescribes employment of four or more individuals during 20 or more complete calendar weeks during one calendar year; instead, it clearly and unequivocably states "for some portion of a day * * * in each of 20 different weeks * * * within the calendar year." Since the statute is clear and unambiguous we submit that since the appellee admittedly had four or more employees for some *portion of a day* in each of 20 *different* weeks within the calendar year, the appellee is an "employer" under Section 9(a) of the Act.

We respectfully call to the court's attention that there is another case pending before this court, numbered 10049 and entitled "*United States of America, Appellant,* vs. *Berlin and Russell Aircraft Machine and Manufacturing Company, a copartnership, Charles T. Russell and Intercontinental Aircraft Corporation, Appellee.*" Said case involves the same issues under the Federal Unemployment Tax, Section 1607(a) of the Internal Revenue Code. The record shows that case has been set for hearing before this court on October 15, 1942, which is the same day for the hearing in the case at bar.

CONCLUSION

The decision of the District Court, holding the appellee was not an "employer" under Section 9(a) of the California Unemployment Insurance Act and disqualifying appellant's claim was erroneous and should be reversed.

Respectfully submitted.

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O

No. 10186

United States
Circuit Court of Appeals
For the Ninth Circuit.

MATSON NAVIGATION COMPANY, a corporation,

Appellant,

vs.

CHARLES HANSEN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Southern Division.
No. 21972 S.

CHARLES HANSEN,
Plaintiff,

vs.

MATSON NAVIGATION COMPANY, a corporation,
Defendant.

COMPLAINT FOR DAMAGES
(Under the Jones Act)

Plaintiff complains of defendant and alleges:

I.

That defendant Matson Navigation Company is a corporation doing business in the State of Cali-

fornia, and having its office and principal place of business in the City and County of San Francisco, State of California, and is within the jurisdiction of the above entitled court.

II.

That during all the times herein mentioned defendant was the owner and operator of the American merchant vessel "Mauna Lei" and operated said vessel in the transportation by water of passenger and freight for hire, in interstate and foreign commerce.

III.

That plaintiff was in the employ of defendant on January [1*] 15th, 1941, in the capacity of able-bodied seaman.

IV.

That on said 15th day of January, 1941, plaintiff was engaged in working about the deck of said vessel. That on said deck there was a cargo of steel beams. That said steel beams had been improperly and negligently stowed aboard said vessel so that said beams were lying edge-wise on said deck and cross-wise on said deck; that in addition thereto quantities of oil had been spilled about said deck and on said beams. That as a result of the careless and negligent manner in which said beams had been stowed aboard said vessel, and the presence of quantities of oil on said deck and about said beams, said vessel was rendered unseaworthy and plaintiff was

*Page numbering appearing at foot of page of original certified Transcript of Record.

thereby not provided with a safe place within which to work and perform necessary duties aboard said vessel. That at said time and place plaintiff was obliged to perform said duties in and upon said deck and said beams; that while going about his said duties he slipped and fell and in falling involuntarily grasped a line, which said line was in motion and guided his hand and fingers into the sheave of a block, with the result that his left hand and four fingers thereof were crushed, broken and bruised. That plaintiff is permanently disabled as a result thereof.

V.

That as a result of said crushing, breaking and bruising due to the carelessness of defendant in failing to provide plaintiff with a safe place to work he has suffered general damage in the sum of $20,000.00.

VI.

That from the date of said injury to the date hereof plaintiff has been unable to perform his occupation. That at the time of said injury he was earning the sum of Approximately [2] $150.00 a month and has therefore suffered further damage in the sum of $1200.00.

VII.

That plaintiff elects to maintain this action under the provisions of Section 33 of the Act of June 5th, 1920, C. 250, 41 Stat. 1007, commonly known as The Jones Act.

Wherefore, plaintiff prays judgment against defendant in the sum of $21,200.00, plus costs of suit herein, and for such other relief as the Court may find meet and just.

Dated: September 12, 1941.

ANDERSEN & RESNER
GEORGE R. ANDERSEN
Attorneys for Plaintiff

[Endorsed]: Filed Sept. 12, 1941. [3]

[Title of Court and Cause.]

MOTION OF DEFENDANT MATSON NAVIGATION COMPANY TO DISMISS AND FOR MORE DEFINITE STATEMENT.

Defendant Matson Navigation Company moves the Court as follows:

I.

To dismiss the complaint in the above matter, on the ground that it fails to state a claim against defendant upon which relief can be granted.

II.

For a more definite statement of the following matters which are not averred with sufficient definiteness or particularity to enable defendant properly

to prepare its responsive pleading and to prepare for trial:

(a) In paragraph IV of the complaint it does not appear therein nor can it be ascertained therefrom how or by whom the steel beams were stowed aboard the deck of the vessel;

(b) In said paragraph IV it does not appear therein nor can it be ascertained therefrom how or in what manner the presence of oil on the deck of said vessel constituted negligence on the part of the defendant; nor how said oil proximately caused or contributed to plaintiff's alleged injuries.

III.

For a bill of particulars on each and all of the grounds specified in paragraph II herein.

Dated: October 17, 1941.

BROBECK, PHLEGER & HARRISON
Attorneys for Defendant.

[Endorsed]: Filed Oct. 17, 1941. [4]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday,

the 17th day of November, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, District Judge.

No. 21972-S Civil

[Title of Cause.]

Defendant's motion to dismiss the complaint herein was argued by George R. Andersen, Esq., attorney for the plaintiff, and Moses Laskey, Esq., attorney for the defendant, and submitted to the Court for consideration and decision. Ordered that said motion be denied, and that the defendant have 10 days within which to file answer. (Notice waived.)

[5]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT MATSON NAVIGATION COMPANY.

Defendant Matson Navigation Company answers the complaint of plaintiff on file herein as follows:

I.

This defendant admits Paragraph I of the complaint; [6] admits that during all the times herein mentioned the defendant was the owner and operator of the American merchant vessel "Mauna Lei" and operated said vessel in the transportation by water of freight for hire in interstate and foreign com-

merce; admits that plaintiff was employed by defendant on January 15, 1941 in the capacity of able-bodied seaman at the rate of $82.50 per month plus found; admits that on January 15, 1941 plaintiff was on the deck of said vessel; and alleges that on said date there was stowed on the deck of said vessel a cargo of steel beams. Defendant alleges that plaintiff placed his left hand on a line and said line moved and carried his hand into a block.

II.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff's left hand and four fingers thereof were crushed, broken and bruised.

III.

Defendant denies generally and specifically each and every other allegation contained in the complaint not hereinabove admitted or alleged.

IV.

Defendant further denies generally and specifically that plaintiff has suffered damage in the sum of $20,000 or in any sum or amount or at all.

SECOND DEFENSE

V.

At the time and place mentioned in the complaint the plaintiff so negligently and carelessly placed himself on the [7] deck of the vessel with reference to the gear on said deck, so negligently and carelessly placed his hand on the line near the block

referred to in the complaint, and so negligently and carelessly comported and cared for himself in and about the matters alleged in said complaint, that as a direct and proximate result of his own negligence and carelessness he sustained the injuries alleged in the complaint, and his own carelessness and negligence directly and proximately contributed to the said injuries; the proportion in which his own negligence and carelessness directly and proximately contributed to the alleged injuries was 100%.

THIRD DEFENSE

VI.

The possibility of sustaining the alleged injuries and damages of which plaintiff complains in the complaint was at all of the times mentioned therein a risk incidental to the plaintiff's employment and occupation as a seaman; said risk was open and obvious; the plaintiff at all times knew that said risk existed; and the plaintiff assumed said risk.

Wherefore, defendant Matson Navigation Company prays that it be hence dismissed with its costs of suit herein incurred.

JAMES MOORE
BROBECK, PHLEGER & HARRISON
Attorneys for Defendant Matson Navigation Company.

(Admission of Service.)

[Endorsed]: Filed Nov. 27, 1941. [8]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial before the above entitled Court, Hon. A. F. St. Sure presiding, trial by jury having been waived by the parties hereto; plaintiff appearing by his counsel, Messrs. Andersen & Resner, George R. Andersen, Esq. appearing; defendant appearing by its counsel, Messrs. Brobeck, Phleger & Harrison, Robert Burns, Esq. appearing.

Thereupon, evidence, oral and documentary, was introduced by the parties; and after the presentation of evidence had been completed by both parties hereto said cause was argued to the Court and thereupon submitted to the Court for decision, and after fully considering all of the facts in evidence:

The Court now finds the following facts:

1. That on January 15th, 1941, plaintiff, Charles Hansen, was employed as a seaman aboard the vessel "Mau*an* Lei", which [10] on said date was owned and operated by the defendant, Matson Navigation Company;

2. That this Court has jurisdiction over the cause as pleaded in the complaint herein by virtue of an Act known as the Jones Act, 41 Stat. 1007;

3. That on said January 15th, 1941, while plaintiff was employed as a seaman aboard said vessel, as aforesaid, his left hand was severely injured in the following particulars, namely, that he received fractures of the ring, middle and index fingers and

the thumb of said hand; that said injuries have healed with a good result due to treatment received at the Marine Hospital in San Francisco and at the Queens Hospital in Honolulu, T. H., and that he has a residual and permanent disability which prevents the full flexion of said fingers and thumb and a loss of grasping strength in said left hand;

4. That said injuries to said hand, as aforesaid, were proximately caused by the negligence of said defendant in negligently failing to provide plaintiff with a safe place to work aboard said vessel, in that: said vessel was loaded on January 8th, 1941, at San Francisco to sail to the port of Honolulu; that prior to sailing said vessel had taken on board a capacity deck load of steel "I" beams and steel bars; that said deck load of steel was stowed on board said vessel in such a negligent manner that shortly after leaving San Francisco said steel deck load shifted, fell over, and became uneven, with the result that it was very difficult and unsafe to walk on and over said steel deck load. That said defendant did not provide a safe walk-way over said deck load;

5. That shortly prior to the injuries sustained by plaintiff he was working on the starboard side of the forward masthouse paying out a guyline; that in said vicinity there was a considerable amount of oil on the deck and that oil was [11] on said deck load; that in carrying out his duties at said time and place, plaintiff was ordered by his superior to go to the starboard rigging and adjust a block; that he adjusted said block; that in returning to his place

of duty, and while walking over said cargo of steel, and due to the negligent and careless manner in which said steel was maintained aboard said vessel by said defendant, and the said oil on said beams and around the vicinity in which plaintiff was working, plaintiff, without any fault, carelessness or negligence on his part, slipped and feel and in so falling his hand became fouled in a moving line and was carried into a block, with the resulting injuries, as aforesaid;

6. That said defendant Company has provided plaintiff with adequate maintenance and cure during the period that he was disabled from work;

7. And from the foregoing recitation of facts as found by the Court, the Court now makes its

CONCLUSIONS OF LAW

The Court therefore and hereby concludes from the facts and the law plaintiff is entitled to receive the judgment of this Court in his favor and against said defendant; and that he should be and he is hereby awarded damages in the sum of $2,000.00, plus costs of Court herein against said defendant Matson Navigation Company, and it is further ordered that judgment be entered in favor of plaintiff and against said defendant in accordance with these findings.

Done in open Court this 5th day of May, 1942.

A. F. ST. SURE
Judge of the U. S. District Court

[Endorsed]: Filed May 5, 1942. [12]

In the Southern Division of the United States
District Court for the Northern
District of California

No. 21972-S

CHARLES HANSEN,

Plaintiff,

vs.

MATSON NAVIGATION COMPANY, a corporation,

Defendant.

JUDGMENT ON FINDINGS

This cause having come on regularly for trial on the 23rd day of April, 1942, before the Court sitting without a jury; George R. Andersen, Esq., appearing as attorney for plaintiff, and Robert E. Burns, Esq., appearing as attorney for defendant, and the trial having been proceeded with, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having rendered its decision and filed its findings and ordered that judgment be entered in favor of the plaintiff in the sum of $2,000.00, and for costs;

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Charles Hansen, plaintiff, do have and recover of and from Matson Navigation Company, a

corporation, defendant, the sum of Two Thousand Dollars ($2,000.00), together with his costs herein expended taxed at $56.65.

Judgment entered this 5th day of May, 1942.

WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 5, 1942. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73b.

Notice Is Hereby Given that Matson Navigation Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 5, 1942.

Dated: May 13, 1942.

BROBECK, PHLEGER
& HARRISON
HOWARD J. FINN
111 Sutter Street,
San Francisco
Attorneys for Defendant
Matson Navigation
Company

(Receipt of Service)

[Endorsed]: Filed May 14, 1942. [14]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 21, inclusive, which together with 1 Volume of the Reporter's Transcript and the deposition of Charles Wood Encell, contain a full, true, and correct transcript of the records and proceedings in the Charles Hansen, Plaintiff, vs. Matson Navigation Company, a corporation, Defendant, No. 21972-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Four dollars and forty cents ($4.40) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 22nd day of June, A. D. 1942.

[Seal] WALTER B. MALING
Clerk
WM. J. CROSBY
Deputy Clerk [22]

[Title of District Court and Cause.]

TESTIMONY

Thursday, April 23, 1942.

COUNSEL APPEARING:

For Plaintiff:
GEORGE R. ANDERSEN,

For Defendant:
ROBERT E. BURNS.

The Court: You may proceed in Hansen v. Matson Navigation Company.

Mr. Andersen: May I briefly outline the case, your Honor?

The Court: Yes, I would like to hear from you.

Mr. Andersen: Most of the facts, here, will not be disputed, I assume. The facts are, briefly, that on the 15th day of January, 1941, Mr. Hansen, my client, sitting at the counsel table, was employed as a seaman, that is, an A. B., aboard a vessel known as the "Mauna Lei," owned by the defendant, Matson Navigation Company. He was an A.B. The ship sailed [1*] from San Francisco on the 15th of January for Honolulu; prior to sailing they had taken on a very large deckload of steel beams and steel reinforcing bars; they were very long, and the load was very heavy. Shortly after sailing out of port, due to the weather, or improper stowage of the beams, one of the two, or a combination of both, this deckload of beams shifted, that is, it fell over, so

*Page numbering appearing at top of page of original Reporter's Transcript.

instead of being an even load it was an uneven load. About a day or so before getting into Honolulu, and in preparation for unloading the ship, the crew was turned to to top the booms, that is, to put the booms in position for unloading, and trimming them; and during that operation they started to raise the booms, they started to top the booms, and get them up to a certain height, and some blocks or some lines on the port side of the ship shifted, or fouled, so that it was necessary to stop that operation with the booms about eight feet in the air. At that particular time Hansen was engaged in this operation of topping the booms on the starboard side of the ship, and when the booms were stopped at that particular time, about six or eight feet in the air, the line being fouled on the port side, he, as an A.B., set the blocks on the lines on the starboard side and walked over to the side or the rigging on the outboard side of the starboard and put a stop on the line that was attached to the rigging, so that it would not shift or move, and then walked back to his position, which was on the mast house. Just as he came back from the shrouds adjusting this block, as he was coming back to his position, a distance of maybe fifteen or eighteen feet, or less, the signal was given to heave away, that is, to resume the operation of topping the booms, and just about that point, while he was walking over the load of beams, and due to the oil that was on the deck [2] and around that place, he slipped; the beams were about this high, and the place that he was working from was about this high, so he had to get down to the deck over these beams,

there was no ladder or anything, and he slipped, and as he slipped he involuntarily grabbed for anything he could get his hands on, and grasped a line which was in motion, and took his hand and fingers into the sheave of a block and broke the bones of his fingers, and cut off a piece of his finger. The basis of our case is the unsafe condition of the deck at the time.

Mr. Burns: May I make a short statement at this time, your Honor?

The Court: Yes.

Mr. Burns: The defendant, Matson Navigation Company, of course does not deny the employment of this man, or the fact that this accident happened at that time. However, the company denies that there was any negligence or failure on its part with respect to this deckload. We expect to show that the deckload was stowed in a safe and seamanlike manner, in accordance with the custom of the sea and ships of this company. They were large steel beams and steel reinforcing bars that were being taken to Honolulu in January of last year; that when the ship got out, the first night out, it hit very heavy seas; the wind, according to the log, was No. 8 on the Beaufort Scale, which is a very heavy wind, right next to a gale, and the ship took seas over its bows. These seas caused the deckload to shift somewhat. However, we expect to show that this is a very common occurrence, at this time of the year there are heavy seas; that no matter how you fasten the deckload, if you get heavy enough seas it will cause it to shift; here there was no danger to the ship, or to the beams in

that shifting, [3] and the ship proceeded on its course. On the day of this accident the men were called out, all hands were called out onto the deck, in order to top the booms.

We expect to show that the weather was fair, it was calm, the sea was smooth; that it is customary, and I do not believe it is denied, that it is customary to top the booms, lift the booms the day before the ship gets into port, the weather permitting. We will show that the men were placed in their particular position by Mr. Rosen, who was the chief mate, and was in charge of the operations, and that the boatswain was at the winches. As the two booms, pair of booms, started to be raised, the blocks on the port side of the ship slipped, and it was necessary to stop the booms in order that the block could be raised a bit, inasmuch as it slipped or came down and fouled on the deckload; that this operation took ten or fifteen minutes; that the duty of Mr. Hansen at that time was, as he had been assigned to slack away on the starboard outboard guy, that he was merely to stand there, that he was not given any orders to do anything else; he was merely to stand in that place. That after the block on the port side had been fixed and secured, the mate gave the order to heave away, and the boatswain hollered "Everybody clear," and the winches were started. A second after they were started a sound was heard of "Ouch," which was from Mr. Hansen, and the mate saw him hauling his hand out of the sheave of the block.

We expect to show by this evidence, your Honor,

that there was no negligence on the part of the company, and if there was any negligence in this particular case it was the negligence of Mr. Hansen, and the accident was solely attributable to his negligence, and as a separate defense, aside from any of these [4] matters, that it is an unavoidable accident that happened in connection with operations at sea, which are necessarily somewhat dangerous, and is a part of the ordinary risks which are attendant on the particular position.

We also expect to show that there was not any unusual amount of grease on the deck, not any more than would naturally come in operating a boat such as the "Mauna Lei," and the deck necessarily must have been very well cleaned when the seas were washing over the deck a few days before.

CHARLES HANSEN,

The Plaintiff, called in his own behalf; sworn.

Mr. Andersen: Q. You are the plaintiff in this case, that is, you are suing the Matson Company?

A. Yes.

Q. What is your occupation?

A. Able bodied seaman.

Q. For how many years have you been going to sea?

A. I have been going to sea over a period of twenty-nine years.

Q. Twenty-nine years? A. Yes.

(Testimony of Charles Hansen.)

Q. Most of the time as——

A. (Interrupting) A. B. seaman.

Q. Able bodied seaman? A. Yes.

Q. You have worked for the Matson Company, that is, on their vessels, from time to time?

A. Yes, from time to time I have.

Q. And on the 15th of January, 1941 you were an able bodied seaman on the "Mauna Lei"?

A. Yes.

Q. Was that your first, or more than one trip on that particular vessel?

A. I was completing my third voyage on that vessel.

Q. On that vessel at that time, on the 15th of January, you sailed from San Francisco, bound for Honolulu? A. Yes.

Q. Now, at that particular time did the ship have a deckload? [5] A. Yes.

Q. What was the deckload?

A. The deckload forward—in the way of my accident?

Q. Yes.

A. On the port side there were beams, which I believe were approximately 50 feet long.

Q. How about on the starboard side?

A. On the starboard side there were beams, and on top of those beams there was reinforcing steel.

Q. Piled?

A. Piled on top of the long beams.

Q. I show you a photograph which purports to

(Testimony of Charles Hansen.)

be a picture of the "Mauna Lei," taken two or three days after you docked at Honolulu. Does that fairly represent the condition of the load at that time?

A. Yes, it does.

Q. Now, at the time this picture was taken, two or three days after the boat was at Honolulu, had part of the steel been removed at that time?

A. Of course, it would be at the time that was made; I was in the hospital at the time, but from what I know of the load, I know there was a great deal of the steel had been taken off the ship.

Q. At that time?

A. At that particular time; the exact amount of tonnage removed from the time we arrived in Honolulu I don't know.

Mr. Andersen: I will offer this photograph in evidence as Plaintiff's Exhibit No. 1.

Mr. Burns: I will object to it on the ground that the photograph does not show the condition of the starboard side of the deck at the time of the alleged accident.

The Court: Let me see it.

Mr. Burns: In the first place, it shows the wooden hatch coverings are up on the steel beams, there, and they could not [6] have been there at the time that this accident occurred, because the hatches were covered.

Mr. Anderson: I offer it, not to show all the conditions as of the time of the accident, because that was impossible, but to give an idea of the condition

(Testimony of Charles Hansen.)

of the deck a day or two later, from which reasonable inference can be drawn in the light of the testimony that will be given.

The Court: The objection is overruled.

(The photograph was marked "Plaintiff's Exhibit 1.")

Mr. Anderson: Q. Now, at the time that deck load of steel was taken aboard, approximately how high from the deck was it?

A. I will have to stand up. I would say approximately between five and six feet.

Q. Between five and six feet? A. Yes.

Q. Now, was this steel load shored or was it merely lashed, or just how was it secured, if at all?

A. When we came from San Francisco that load was not shored, there were no wooden braces put in between, I mean braces up against the side. There were just temporary lashings put on that load.

Q. Temporary lashings?

A. Temporary lashings.

Q. Now, after you left San Francisco on the 15th, did the deckload remain in position, or did it slip?

A. I beg your pardon, it was not the 15th.

Q. After you left San Francisco on the 15th, I mean sometime thereafter, did it remain in position, or did it shift?

A. Well, it shifted around eight o'clock that night, the sailing night, the same day.

Q. When you say "shifted," just what do you mean? A. Well, it collapsed.

(Testimony of Charles Hansen.)

Q. Do you mean by that it spread over?

A. Yes, it spread all [7] over the deck, and, as a matter of fact, bent the turnbuckles.

Mr. Andersen: For easier reference, if it please the Court, could I use the duplicate of Plaintiff's Exhibit 1? It is easier for handling.

The Court: Yes.

Mr. Andersen: I show you a duplicate of Exhibit No. 1. Now, at the time that that load collapsed, did it or did it not cover the steampipe cover which is shown in that picture?

A. It covered it, I would say, completely, almost completely, except one of the beams—if I remember correctly, it hung on the edge of the hatch coamings of No. 1 and No. 2 hatches, and under that, of course, it was wrenched with all this reinforcing steel.

Q. Did these beams cover any portion of the hatches No. 1 and No. 2?

A. Yes, it covered them completely. As a matter of fact, the carpenter could not get in——

Mr. Burns: I will object to his conclusion.

Mr. Andersen: All right.

Q. After the load collapsed, could the hatch covers of hatches Nos. 1 and 2 be removed without first removing part of the steel?

Mr. Burns: Objected to as calling for a conclusion.

The Court: I think it does.

Mr. Andersen: Yes, it does, I am sorry.

Q. After the vessel arrived at Honolulu did they

(Testimony of Charles Hansen.)

remove the steel before they took off the hatch covers?

Mr. Burns: I object to this as hearsay. He said he was not there.

Mr. Andersen: Q. Did you go to the hospital before they took off the hatch covers?

A. I did.

Q. That is quite all right. Now, I direct your attention to the mast house shown in the picture. Might I show your Honor the [8] other picture? They are duplicates of each other, but the mast house is there. That is looking at the starboard side of the ship?

A. That is looking forward.

Q. A day or so before you arrived at Honolulu the whole crew was turned to to top the booms, was it not?

A. The day before we arrived in Honolulu, yes.

Q. And were you directed to do any particular task in this operation of topping the booms?

A. The seamen are not directed to do those things, they usually gravitate to them. In other words, the most important jobs are taken by the able bodied seamen. It is not customary for a mate to say, "You take this," or "You take that," except on special jobs.

Mr. Burns: I will ask that this all go out as not responsive, it is not responsive to any question.

The Court: Denied.

Mr. Andersen: Q. This particular operation that you assumed was what—what were you doing in this operation?

(Testimony of Charles Hansen.)

A. Starting from when we were turned to?

Q. Yes.

A. We were turned to about 1:15 or about 1:30, and of course I turned to on the starboard side.

Q. In other words, you were standing on the mast house shown in the picture on the starboard side, ready to slack away the line attached to one of the booms. That is what you were doing? A. Yes.

Q. I show you another photograph, which is marked Plaintiff's Exhibit For Identification No. 1, and ask you if this picture shows the starboard side of the forward mast house, and if it shows the cleat that you were working on. A. Yes.

Q. Is that the cleat, there?

A. Yes, that is the cleat.

Q. In other words, on that picture you were standing in what [9] position with reference to that cleat? Where were you standing in reference to that cleat?

A. I was standing astern of the cleat, I had to face the operation.

Q. In other words, the boom that was being raised was forward of that mast house?

A. Was forward of the mast house, and I was standing astern of the cleat.

Q. So when you were standing there to slack away on that line you were standing aft of the cleat facing forward? A. Yes.

Mr. Andersen: May I offer this in evidence?

The Court: Admitted.

(Testimony of Charles Hansen.)

(The photograph was marked "Plaintiff's Exhibit 2.")

Mr. Andersen: Q. Now, the lines were all set and the blocks were all set, and the operation was commenced, was it? A. Yes.

Q. To top the booms? A. Yes.

Q. And the signal was given to top the booms?

A. Yes.

Q. And I assume that Mr. Rosen gave the signal to top all the booms, that is, to heave away?

A. Yes, he was in charge of the operation.

Q. After the signal was given and they started to heave away, what happened?

A. While I was standing at that cleat, when the boom was raised to a height of about four to six feet it became fouled in a signal halyard up forward.

Q. What became fouled?

A. The booms, themselves.

Q. Became fouled? A. Yes.

Q. When they became fouled did the operation stop?

A. The order was to stop the booms, yes; as a matter of fact, on the fouling it automatically stopped.

Q. Then for a short period of time I assume that the booms were held in this position about four to six feet in the air, and the [10] winches were stopped, and I further assume that proper steps were taken to eliminate this fouling on the port side?

(Testimony of Charles Hansen.)

Mr. Burns: I will ask that he not lead the witness, and let him testify.

The Court: Objection sustained.

Mr. Andersen: Q. Then after the booms were stopped at that point, what was done at that time, if you know, so far as the port side was concerned?

A. It would be merely an assumption on my part.

Q. Then approximately how long was the operation stopped at this point?

A. I would say a few minutes.

Q. A few minutes? A. Yes.

Q. Now, directing your attention to the picture showing the starboard side of the mast house, there, and showing that cleat, were any of the other blocks shown on that starboard side of the mast house being used in this operation?

A. Yes, there was a snatch block which was attached to the starboard rigging as a fair lead, because of the deck load, and ordinarily there is a steady strain on that snatch block, which is attached to that rigging, by what is called a guy. Now, when the boom stops and starts swinging with the ship, as the ship was rolling, it had a tendency to jerk that snatch block, and that is exactly what it was doing.

Q. Wait a minute, I do not believe we are talking about the same thing. I am talking about a block on the side of the mast house, not the rigging.

A. I am sorry.

Q. In other words, was there a block in use in this operation near this cleat by which you were standing?

(Testimony of Charles Hansen.)

A. Yes, it was a snatch block attached to the mast house.

Q. In the picture that you have there, does the hook show upon [11] which the block was attached?

A. This picture does not show it.

Q. Does this photograph, which is Plaintiff's Exhibit No. 2, show the block, or show the hook upon which the block was attached on the side of the mast house? A. Yes, it does.

Q. Can you mark it there?

The Court: Isn't it marked?

Mr. Andersen: Not as yet.

Q. Would you mark it?

A. This is the snatch block.

Q. Just put an "X" there. That is the toplift snatch block.

Mr. Burns: That is the block that he got his hand in?

Mr. Andersen: Yes.

Q. During the time that this operation stopped, for the several minutes that you mentioned, what did you do?

A. The boatswain directed my attention to the snatch block that was on the rigging.

Q. Just a minute. You were standing right alongside of this mast house?

A. Yes, standing by the cleat.

Q. Now, this rigging that you are talking about, where was that, and how far away was it?

A. The rigging shown in this picture, it would

(Testimony of Charles Hansen.)

be an estimate of distance, I would say probably eight to ten feet.

Q. Eight to ten feet?

A. Yes, a little bit forward of the mast house.

Q. In other words, you went over to this block that was attached to the rigging?

A. To the rigging.

Q. Why did you go there?

A. I went there—the boatswain called my attention to the block, and as a matter of fact, it is second nature with a sailor, when he sees something——

The Court: Just answer the question.

A. I went to the snatch block and put a stopper on.

Q. What do you mean by a "stopper"?

A. A stopper is a line that [12] you put under the snatch block to keep it from sliding down, to keep the topping lift from chafing the deck load.

Mr. Andersen: Q. In order to get there, how did you get there?

A. I had to climb over the deckload.

Q. What was the condition of the deckload at the time you crawled over the deckload?

A. It was clear up against the hatch coaming, it covered the guard that is shown in the picture, and it was very dangerous.

Q. Was it even, or was it rough?

A. It was rough, very rough, and there was a lot of grease over it.

The Court: Q. Over what?

(Testimony of Charles Hansen.)

A. Over the deckload.

Q. Over the steel? A. Yes.

Q. On top of the steel?

A. On top of the steel.

Mr. Andersen: Q. Now, after you put this stopper on the block which was on the rigging, what did you do?

A. Why, I was on my way back to the cleat.

Q. Now, just a moment: While you were on your way back to the cleat, tell us in your own words just what happened.

A. I was on my way back to the cleat——

The Court: Q. From where?

A. From the outboard rigging.

Mr. Andersen: Q. You stated something about the boatswain calling your attention to something.

A. Yes.

Q. What did he say?

A. He said, "Hansen, stop that snatch block, put a stopper on that snatch block.

Q. You went out there and put a stopper on it?

A. Yes.

Q. Now, you are on your way back.

A. I am on my way back to my former position at the cleat.

Q. That, you say, was a distance of about eight feet?

A. I would presume so, eight or ten feet.

Q. Point out that distance in this court-room.

A. From this desk [13] to those windows.

(Testimony of Charles Hansen.)

Q. You say it would be about that distance you were coming back?

A. Yes, I was coming back to my position.

Q. At the cleat?

A. Yes, and on my way back, and that snatch block in the picture stretched out from the mast house about two feet—I was coming back, and this line coming across from that snatch block on the rigging, coming across to the snatch block on the mast house, stretched out, and the ship was rolling, and I slipped and fell, and necessarily I put my hand out to grab this line, this topping line, which was leading to the snatch block, and my hand was on it, and then they started heaving away, and my hand went right into the snatch block, and I pulled it out.

Q. That is how it happened, was it?

A. Yes.

Q. At the time that happened were you right at the side of the load, or middle of the load?

A. I was near the edge.

Q. To get down into this hole?

A. To get down into this hole.

Q. That is the hole shown in Exhibit No. 1?

A. Yes.

Q. In other words, you were going to get down on the deck and stand aft of the cleat? A. Yes.

Q. Now, you say your hand was drawn into the block. A. Drawn into the block.

Q. What happened to your hand at that time?

A. I pulled it out, I had my glove on, and I took

(Testimony of Charles Hansen.)

my glove off, and as a matter of fact when it went in I don't know whether I yelled, but I took my glove off, and my finger was hanging off, and these fingers here were all crushed, I realized that I had had an accident, so I proceeded to the bridge from there, I did not stop, I just simply went up to the bridge.

Q. How long were you treated at the hospital for your hand?

A. I was treated in Honolulu at the Queen's Hospital, an in-patient [14] for three weeks.

Q. An in-patient? A. Yes.

Q. Then you came to San Francisco?

A. No, I was an out-patient there then for, I believe, five weeks, and then I received a discharge, recommending——

Q. All I want to know is how long you were there.

A. About two month.

Q. Then you came to San Francisco?

A. Then I came to San Francisco.

Q. How long were you treated at the hospital here, at the Marine Hospital?

A. I think it was from March to about the latter part of August.

Q. From March until about August?

A. Approximately.

Q. After August, sometime, you went back to sea again?

A. I made two trips on the "Mariposa."

Q. What was the condition of your hand right after this accident? Will you explain to the Court

(Testimony of Charles Hansen.)

the condition of your hand right after the accident?

A. Right after the accident?

Q. Yes.

A. This tip of the finger was amputated, the bone was exposed, these fingers were all crushed, I didn't know just what the exact condition was until we had X-rays, the X-rays will show that.

Q. They were all crushed?

A. They were all crushed.

Q. Were the bones broken?

A. Well, the X-rays showed that, I did not know it at the time, all the bones were broken, of these fingers, here.

Mr. Burns: I suggest, inasmuch as we have the hospital records available, that the hospital records show the extent of the injuries.

Mr. Anderson: Q. Was it very painful?

A. Yes, it was. [15] As a matter of fact, I believe in Honolulu the doctor told the nurse to give me some——

Q. Was it painful? A. It was painful.

Q. What is the condition of your hand at the present time?

A. At the present time I feel I have lost a lot of grip, I tested it when I was on the "Mariposa," and I can't bend this finger completely yet.

Q. That is the middle finger?

A. Yes, this finger I can bend just that far.

(Testimony of Charles Hansen.)

Q. Approximately how much loss of strength have you had in your hand?

A. I could not positively say how much I have lost, but I noticed on the "Mariposa," at the time when we started painting the ship, and I got on the boatswain's chair, and ordinarily you hold yourself with your left hand, and make yourself fast with the right hand, and I couldn't do it, and at this time, I had to have someone put the boatswain chair on.

Q. Does that interfere with your work as a seaman?

A. I would hesitate to trust it entirely, not only on my own behalf, but on behalf of my shipmates.

Q. With respect to oil aboard the ship, I will show you Plaintiff's Exhibit No. 5, that is a picture of the cleat. I will show you this picture. Can you direct my attention to any oil there?

A. Yes, I can, there is some oil here, on the winch body.

The Court: Q. You did not slip on the winch body?

A. No, but we were working around there at all times.

M. Andersen: Q. That cleat by which you were working was approximately how far from that winch? A. You can see it right here.

Q. In other words, just a few feet?

A. Yes. [16]

The Court: Q. This is the cleat?

A. This is the cleat.

(Testimony of Charles Hansen.)

Q. You can see that, can't you?

A. Yes, I see that.

Q. You say the oil was where?

A. The grease comes off the machine there, and it was around there.

Q. Gathered around where?

A. On the floor.

Q. That is where you were standing?

A. Yes.

Mr. Andersen: Q. Generally, there was oil all around where you were working, and on the deck load?

A. Yes, walking around there would carry it around.

Q. I will show you—I do not believe this is in evidence—another picture. Can you identify that picture, please?

A. Yes, that is a close-up of the oil that is shown in that picture of the grease.

Q. In the last exhibit? A. Yes.

Mr. Andersen: I will offer this in evidence as Plaintiff's Exhibit next in order.

Mr. Burns: Objected to on the ground that it does not show the condition at the time of the accident, but a few days after.

The Court: Overruled.

(The photograph was marked "Plaintiff's Exhibit 3.")

Mr. Andersen: Q. You were not on the vessel at that time, were you? A. No.

(Testimony of Charles Hansen.)

Q. In other words, as soon as the ship got to Honolulu you were taken to the hospital?

A. I went to the hospital.

Mr. Andersen: You may cross-examine.

Cross-Examination

Mr. Burns: Q. Now, Mr. Hansen, what was your watch when you were on the ship?

A. 4:00 to 8:00.

Q. 4:00 to 8:00 watch? A. Yes.

Q. And when the deck cargo shifted on the night that you left [17] San Francisco, did you see it shift?

A. I did not see it shift.

Q. So, when you testified that the deck cargo collapsed, that was your conclusion or description of it, isn't that correct? A. Yes.

The Court: Q. Did you see that deck cargo before? A. Yes.

Mr. Burns: I am not contending he did not see it before, or after.

The Court: What is the fact, did the cargo shift?

Mr. Burns: The cargo shifted, but I deny that it collapsed. I do not like the word "collapsed."

The Court: What do you mean when you say it collapsed?

A. I have made a chart to give an idea of it.

Q. You mean you made a drawing?

A. Yes, I made this. This gives a general idea. It is not according to scale, but that is the way these beams were stacked.

(Testimony of Charles Hansen.)

Q. You have a diagram showing the beams on the port side?

A. These beams were stacked in this manner the night that we sailed. There were only two chain lashings, there were no braces between them. In other words, my idea in drawing this was to give you an idea of how these beams that were shown in the photograph were stacked up, they were all stacked up that way.

Q. What do you mean, on end?

A. Yes, on end.

Mr. Burns: Q. This is a cross section?

A. Yes, running forward. If you look straight down you can see this is the anchor windlass, this is the No. 1 hatch, this is the No. 2 hatch, and this is where I fell, and this is the way the cargo was before it collapsed. On the starboard side it was stacked the same way, with reinforcing steel. That was the condition of the load which caused the collapse of the load at 8:00 o'clock [18] that night, there was nothing to hold it except these lashings, and these turnbuckles bent.

The Court: Q. What do you call that steel that was on board?

A. I would call that construction steel.

Mr. Andersen: It was I-beams.

Mr. Burns: It was I-beams for construction work.

The Court: Q. How long were those beams?

A. About 50 feet, your Honor.

(Testimony of Charles Hansen.)

Q. And do you know what they weighed?

A. About two and a half tons. They were simply balanced there, they had to go.

Q. When did you draw this?

A. At my home.

Q. From memory?

A. Yes, from memory. I went aboard the ship the last time she was here and I tried to get the proportions of this, and this gives you a general idea. This is the way these beams were, they were telescoped.

Mr. Andersen: Pointing to Exhibit No. 1.

A. That is the way the beams were originally stacked, like that, and there is another exhibit that shows how these beams came over, and that is the reason I used the word "collapsed."

Mr. Burns: Q. Now, referring to Plaintiff's Exhibit No. 1, you say this shows how they were originally stacked? A. Yes.

Q. But you also testified it does not show them after they shifted on January 8, is that right?

A. After they shifted?

Q. At the time of your accident the beams did not look this way, as they do in No. 1? Do you understand what I mean? A. No.

Q. You stated that the beams running fore-and-aft in the center part of Plaintiff's Exhibit 1 was the way the beams were before they shifted.

A. This is the way the beams were.

Q. I am talking about this photograph.

(Testimony of Charles Hansen.)

A. Oh, no, the other [19] photograph.

Q. No, the one I have in my hand. You have just stated to his Honor that these beams running fore-and-aft in the center depicted the way they were standing before they shifted.

A. In this particular stack, here.

Q. In that particular stack?

A. In that particular stack, and that is the way the beams were stacked.

Q. At the time of your accident the beams you testified were not in the position that they are now?

A. No, they had all collapsed.

Q. They had gone over onto the steam guard?

A. They had shifted over on the steam guard and both No. 1 and 2 hatches.

Q. So that although you don't know you presume that when they got into port these beams were pulled off the steam guard, is that correct?

A. I have been told that, it is hearsay, I am assuming that.

Q. You are assuming that? A. Yes.

Q. Now, Mr. Hansen, directing your attention to the day of the accident, you were stationed at the starboard side of the mast house, there, ready to slack away on No. 1 starboard guy, is that correct?

A. Correct.

Q. You testified, assuming that this is the mast house to my left, here, that you had hold of the guy in both hands just prior to the beginning of this operation, and the guy was wrapped around a cleat

(Testimony of Charles Hansen.)

several times, is that correct? A. No.

Q. How were you standing?

A. I was standing astern of that cleat.

Q. Astern of the cleat?

A. Whether I had both hands on it, or not, I don't remember.

Q. You don't remember? A. No. [20]

Q. You may just have had one hand on. I am asking you, did you have one or two hands?

A. I don't remember.

Q. Is one hand sufficient to slack away on that guy? A. Not to slack away, no.

Q. It is not sufficient to slack away?

A. No.

Q. You need two hands to slack away?

A. Yes.

Q. If you were just standing there waiting you just put a hand on it?

A. No, that is not my answer.

Q. But at this time you don't know whether you had one or two hands on it? A. At what time?

Q. Just before the operation started, on the day of the accident.

A. I don't remember whether I had one or two hands.

Q. Now, you are about a foot or about a foot and a half astern, or aft of this cleat?

A. I was standing in a vertical position, and I presume I would be a foot and a half from the cleat.

Q. About that? A. Yes.

(Testimony of Charles Hansen.)

Q. And you were facing forward?

A. I was facing the operation.

Q. That is, facing forward?

A. Facing forward, that is right.

Q. Now, you say that operation started.

A. When everything was in order the chief mate started the operation.

Q. What did he do, say something—"Heave away"? A. "Heave away"?

Q. That is customary?

A. That is customary.

Q. So, you were standing there, not remembering whether you had one or two hands on this guy, and you were facing forward, and you were about a foot and a half back of the guy, that is, aft of it, you were in your place, is that right?

A. I was in my place.

Q. You heard the mate say "Heave away"?

A. I did not hear him; as a matter of fact, I don't know whether I saw the mate, but [21] the man that pays more attention to the mate when the "Heave away" signal is given is the man on the winch.

Q. Didn't you testify you heard the mate say "Heave away"?

A. I would say I don't remember.

Q. You don't remember?

A. As a matter of fact, it is unimportant to me.

Q. Did the boatswain say anything?

(Testimony of Charles Hansen.)

A. The boatswain was working, the same as we were.

Q. Did he say anything? A. No.

Q. He did not say anything? A. No.

Q. After the mate said, "Heave away," the boatswain started the winches, is that correct?

A. That is correct.

Q. And then as soon as the boatswain started the winches both the No. 1 starboard boom and the No. 1 port boom started to come out of their cradles, is that right? A. Yes.

Q. These booms, for the information of the Court, because I do not think we have a picture of it here, the port and starboard booms are attached to the mast, which is stuck in this mast house that he is standing next to.

A. These booms are attached to the mast house?

Q. Attached to the mast house. A. Yes.

Q. These booms are generally parallel when they are at rest, is that correct?

A. On the "Mauna Lei"?

Q. On a ship.

A. On the "Mauna Lei," pretty close.

Q. They both lay forward and aft? A. Yes.

Q. They are called No. 1 port and starboard booms? A. They are.

Q. The purpose of this operation was to get them up so that they were in a perpendicular position, is that right?

A. That is correct.

(Testimony of Charles Hansen.)

Q. Preparatory to getting into Honolulu so you could discharge [22] cargo?

A. The longshoremen could.

Q. And when the booms got up a few feet, five or ten feet, something happened, is that right?

A. That is right.

Q. What happened?

A. I believe the booms got foul of a signal halyard.

Q. What do you mean by that, the booms got foul in what way?

A. With the signal halyard.

Q. What is that?

A. The signal halyard is a halyard usually used for the anchor light.

Q. You will have to explain a little more than that to make it clear.

A. It is attached to the forestay. This signal halyard is attached to a part of that forestay almost above, or rather a little bit aft of the anchor windlass.

Q. All right, just a minute: I do not like to interrupt you in your description, but I do not understand it very well. I am not a sailor. Perhaps the Judge knows better than I do, but to make it simple, was it the end of the boom, the top of the boom that got foul of some of the lines that are attached to the ship?

A. I will have to explain that to you. On these booms, as any seaman knows, on the end of these

(Testimony of Charles Hansen.)

booms there are outboard guys attached to the booms close to the end. As I said before, I am not sure what happened, except I am assuming now that this signal halyard is what fouled the booms. It happens on a lot of ships.

Q. Is that halyard attached to the end of the boom?

A. No, it is attached to the forestay and running right down to the hatch.

Q. You don't know for sure, but you assume that this signal halyard was fouled?

A. I am quite sure they were afoul of the boom.

Q. Were they afoul of both booms, or one boom?

A. Both booms [23] were affected.

Q. Were they afoul on both booms?

A. I don't remember.

Q. You don't remember? A. No.

Q. Were the booms stopped?

A. They were stopped as soon as they became foul.

Q. That is what I mean. How high were they off the cradle?

A. I would say between four and six feet.

Q. Now, after they were stopped what happened?

A. Well, naturally, the boatswain called my attention to the snatch block in the rigging.

Q. On which side of the ship?

A. On the starboard side, where I was working.

Q. On the same side you were working?

A. On the same side I was working.

(Testimony of Charles Hansen.)

Q. What did the boatswain say to you?

A. He said, "Hansen, I think you ought to stop that. I thought of that at the same time, simultaneously.

Q. Was there anything happened to the snatch block?

A. Sure, it was slipping a little.

Q. That block was slipping a little? A. Yes.

Q. Down on the rigging?

A. Not all the way down.

Q. How much?

A. It started to slip, I could not say how much, possibly a few inches.

Q. A few inches?

A. Yes, I could not recall exactly.

Q. You say it had started to slip down on the rigging? A. Yes.

Q. Did they have a snatch block like that on the port side?

A. Yes, the same thing.

Q. Had the snatch block on the port side slipped?

A. I don't know anything about the port side.

Q. You don't know?

A. I am presuming. [24]

Q. You could not see from there?

A. No, I could not.

Q. You say that the snatch block on the starboard side slipped a few inches? A. A few inches.

Q. And then you walked over or crawled over the deckload, is that right?

(Testimony of Charles Hansen.)

A. That is correct, and I was proceeding back to my position at the cleat.

Q. Just a minute, we are at the mast house, and you walked over the deckload?

A. Yes, I crawled over the deckload and went over the rigging with the piece of line, and put a stopper on the snatchblock.

Q. By a stopper, you mean you snubbed it up?

A. I stopped it, to keep it from slipping down.

Q. How far was it from where you had been standing a couple of minutes before, that is, when you were standing by the cleat, to where you worked on the snatch block?

A. I would say about eight to ten feet.

Q. That is the distance from where you stood a few minutes before? A. Yes.

Q. Then after you finished fixing the snatch block you started back over the same route, is that correct?

A. Not over the same route.

Q. You did not take the same route?

A. No, I did not.

Q. You took a different route?

A. Might I explain what route I took?

Q. You took a different route?

A. Yes, I did take a different route.

Q. What different route did you take?

A. I can explain that to you on the diagrom. I went on a direct route when I went over, and when I came back I came back toward the snatch block on the mast house. [25]

(Testimony of Charles Hansen.)

Q. So you went over in a direct line, and you came back over a different path? A. Yes.

Q. Towards the snatch block on the mast house?

A. Yes.

Q. And you say that you got to the snatch block, or, rather, you got to the edge of the deck load, there, and you slipped, is that right?

A. No, that is not right.

Q. All right, where were you when you slipped?

A. I was slipping in walking over that deck load, but just as I was near this hole, this edge, the ship was rolling, and I was thrown into this topping lift. I fell into it.

Q. Just before your hand dropped onto the topping lift at that point, how far were you from the point that you had been when you were slacking away on that guy?

A. From the cleat up to the level of the deck load the distance would be a few feet.

Q. How many?

A. Well, I couldn't say exactly. The photograph will give you just as good an idea as I could, probbably.

Q. From your recollection, it was about what?

A. Between two and three feet, approximately.

Q. On a plane, on a level? A. Yes.

Q. How high was this deckload off the deck at that point?

A. As I said before, I believe between five and six feet.

(Testimony of Charles Hansen.)

Q. Between five and six feet? A. Maybe.

Q. And the steam guards are about 18 inches off the deck, aren't they?

A. I don't remember, I would say approximately.

Q. They are more or less uniform on all ships, aren't they, these steam guards?

A. They are not uniform. I would say these particular steam guards were approximately one foot, or say twelve to eighteen inches.

Q. Now, on the way back you say you called out something—as you started back, or just before you started back? [26]

A. I believe I said, "Hold everything."

Q. You called that out?

A. Who was listening, I don't remember.

Q. I asked you if you called that out?

A. I am quite sure.

Q. When you got back, or just before you slipped, did you hear the boatswain say anything?

A. I was not interested in the boatswain, no.

Q. You did not? A. No.

Q. Did you hear the mate say anything?

A. Just before I slipped?

Q. Yes. A. No.

Q. Did you hear the mate say, "Heave away"?

A. No.

Q. Did you hear him say "All clear," or anything to that effect? A. No.

(Testimony of Charles Hansen.)

Q. Then you slipped, and you say that your hand, your left hand went on this topping lift, is that right?

A. Well, instantaneously I grabbed it.

Q. I did not ask you that. It went on it?

A. It went on it.

Q. And at that instant the topping lift started, and your hand was drawn into this block?

A. Yes.

Q. Is that right? A. Yes.

Q. Do you know how far your hand was from the sheave of the block where your hand hit it? If you don't know, say you don't know.

A. Well, I don't remember exactly.

Q. Well, was it three or four feet, or what, to the best of your recollection?

A. To the best of my recollection, I would say it was within a foot.

Q. Now, as soon as your hand got in there you jerked it out, or they stopped the winches and you jerked it out, is that it? A. Yes.

Q. What happened when your hand got in there, did you holler?

A. I don't remember what I did, it happened so quickly. I remem- [27] ber this, as soon as my hand went in there I pulled it out and apparently I pulled the glove off, and I saw my finger, and I said, "I am hurt."

Q. Then you went up to the bridge?

A. From there I proceeded on up to the bridge.

(Testimony of Charles Hansen.)

Q. And you saw the officer there, and then you saw the captain, is that correct? A. Yes.

Q. Then you saw the purser and he gave you first aid, is that correct? A. Yes.

Q. Then the next day the ship arrived in Honolulu, and you were taken to the hospital?

A. I was not taken, I went.

Q. You walked?

A. I did not even have my certificate.

Q. But you got in the hospital?

A. I got in the hospital.

Q. You are absolutely certain, are you, Mr. Hansen, that you were not standing on the deck, a couple of feet, or a foot or two, on the starboard side of the mast house just before you were injured?

A. Positive.

Q. You are certain also that you never arrived back to that point from your work at the starboard rigging? A. Starboard rigging?

Q. Yes. A. Positive.

Q. You never got back there?

A. I was starting back there.

Q. You never got back there?

A. I never got back there.

Q. Mr. Hansen, this grease that you see in one of these photographs, you were not there at the time that photograph was taken, Exhibit 3?

A. No.

Q. You were not there at the time this photograph was taken, were you? A. No.

(Testimony of Charles Hansen.)

Q. So you didn't see the winch at the time this photograph was taken? A. No.

Q. You say you have been on ships for a good number of years, [28] have you? A. Yes.

Q. Do you also say that it is unusual to have some grease under the winches?

A. Yes, it is unusual.

Q. It is unusual?

A. In that amount, I will have to qualify that.

Q. This amount of grease that is shown under that winch is an unusual amount, is that correct?

A. Unusual amount.

Q. When the ship enters port the longshoremen work the winches, don't they? A. Yes.

Q. Before the longshoremen work the winches they get them in condition to work, don't they?

A. The deck engineer.

Q. And sometimes they are worked by the longshoremen for two or three hours, aren't they, at a stretch, or all day?

A. Maybe all day and night.

Q. And when the deck engineer is getting them ready to work he oils and greases them, doesn't he?

A. At all times, that is, at the necessary time.

Q. And the winches on the "Mauna Lei" and other ships are sprayed with sea spray when you are out at sea, aren't they, if it is a rough sea?

A. Yes.

Q. If you take any water over the bow the sea water washes over the winch, isn't that right?

(Testimony of Charles Hansen.)

A. Lots of times it does.

Q. Now, by the way, who took these pictures for you? A. Charles Rasmussen.

Q. Who is he? He was another member of the crew? A. Yes.

Q. And you asked him to take them for you, I presume? A. Yes, I did, after the accident.

Q. Of course, after the accident. Now, Mr. Hansen, you went back to work, did you not, on the "Mariposa" in September, sometime, of last year?

A. That is right.

Q. And you worked steadily on that ship until January 5, is that [29] right? A. Yes.

Q. And you got off, or signed off the ship at that time in order to be here for this case, isn't that true?

A. Yes.

Q. You have been able to get work between those dates if you wanted to, haven't you?

A. I have tried for certain positions.

Q. There is plenty of work available for men who want to sail? A. Yes, plenty of work.

Q. You were also paid your maintenance after this accident, weren't you?

Mr. Andersen: There is a stipulation as to that.

Mr. Burns: Let us bring it out.

Q. You were paid $298 in maintenance, were you not?

A. I don't know what it amounted to, $2 a day.

Q. $2 a day for all of the time you were out of a vessel? A. Yes.

(Testimony of Charles Hansen.)

Mr. Burns: Will you stipulate that $298 was paid him in maintenance?

Mr. Andersen: I will stipulate to that.

Mr. Burns: Q. You were also paid $46.75, which was the amount of your wages to the end of the voyage? A. Yes.

Q. In other words, you signed on for a voyage from San Francisco to Honolulu and return, and you left the ship at Honolulu because of this injury, and you were paid wages for the balance of that voyage? A. Yes.

Q. You were also brought back to San Francisco by the Matson Company?

A. That is correct.

Q. Now, isn't it true, directing your attention to the day of the accident, isn't it true, Mr. Hansen, that you never moved from your position by the cleat by the mast house, there, at all—that is, during the fifteen or twenty minutes that this operation took place? A. I don't understand. [30]

Q. Directing your attention to the day of the accident, isn't it a fact that during all of the time that these booms were being fixed, and up to the time that you suffered your accident, isn't it true that you never moved from your position there at the mast house on the starboard side?

A. That I did not move from my position?

Q. Yes.

A. I don't understand that question.

Q. You deny that, don't you?

(Testimony of Charles Hansen.)

A. I don't understand the question, will you put that question different?

Q. I don't know how I can make it any clearer.

A. I don't understand the question.

Q. Isn't it a fact that you did not go over to fix the block on the starboard rigging?

A. That I did not, you say?

Q. Yes.

A. When the boom started swinging?

Q. At any time?

A. I went over to the starboard rigging.

The Court: Q. He said you did not.

A. I did, of course I went over there.

Mr. Burns: Q. You also deny that you were standing during that period of time by the cleat, there? A. I deny that, that is correct.

Q. Have you ever had any prior injuries?

Mr. Andersen: Just a moment. I will object to that as incompetent, irrelevant, and incompetent.

The Court: Overruled.

Q. Have you ever had any prior accidents?

A. Two.

Q. Were you injured in both of them?

A. I had double hernia in one.

Mr. Burns: Q. You say that you had two prior injuries at sea? A. Yes.

Q. Was that within the last few years?

A. Yes. Those were all I [31] had in 29 years.

Q. I will ask you, Mr. Hansen, to read on page 35, from line 12 to——

(Testimony of Charles Hansen.)

The Court: What is that?

Mr. Burns: This is the deposition of Charles Hansen, the plaintiff, which was taken on March 20, 1942. Read from line 12 to 15; read them to yourself.

A. Well, I must have misunderstood the question.

Q. Just a moment.

A. The way the question was put here——

Q. Just a moment. I will read it to you, and then you may explain. Reading from page 35, line 12 of the deposition of Charles Hansen, taken on Friday, March 20, 1942:

"Q. Have you ever had any injury to that hand before? A. Never.

"Q. Now, have you ever had any other injuries before this particular one on January 15, 1941? A. No, sir.

"Q. Never had any, at all? A. No."

Now, then, did you so testify?

A. I must have testified that way.

Q. You do not deny that you so testified, do you?

A. Well, I don't remember about that.

Mr. Burns: Counsel, may I have a stipulation as to that?

Mr. Andersen: I will stipulate that those questions were asked and those answers were given.

Mr. Burns: Q. Those answers are not correct, are they, Mr. Hansen?

(Testimony of Charles Hansen.)

A. That first answer regarding my hand is correct.

Q. That is correct? A. Yes.

Q. But the other answers to the other questions are not correct?

A. The other two answers are incorrect, the way it reads.

Q. This other accident you refer to happened on July 28, 1940, on the "Monterey," isn't that correct?

A. I believe it was, yes. [32]

Q. And you fell, or alleged that you fell off the mast and hurt your back and had a hernia, isn't that right?

A. Are you combining the two accidents?

Q. No. The first accident was on May 15, 1939, is that right? A. What accident was that?

Q. That is the one on the "Matsonia."

A. I had a double hernia.

Q. And that action was also filed in this court, was it not?

A. That was settled out of court. I don't know whether it was filed here in court.

Q. Wasn't that action filed under the title of Charles Hansen v. Matson Navigation Company, No. 21-253-L, District Court of the United States, Northern District of California, Southern Division?

A. I left it in the hands of the attorney, I don't know about it.

Q. I will show you a copy, and ask you if the verification on the back of this case refreshes your

(Testimony of Charles Hansen.)

memory. That is a copy. Who was your attorney—Maxwell Peyser?

A. No, I don't think so. I forget.

Q. You forget Maxwell Peyser?

A. That is right.

Q. You remember also, Mr. Hansen, that in that case you alleged in paragraph 5 that the plaintiff slipped on grease on the deck?

Mr. Andersen: May it please the Court, I think I will object to this as immaterial, irrelevant, and incompetent.

The Court: Overruled.

Mr. Burns: I will read part of that allegation to refresh your memory:

> "And while the said plaintiff was in the act of trimming a ventilator on the said steamship 'Matsonia,' these defendants carelessly and negligently caused and permitted grease to be placed and to remain upon the deck wherein the plaintiff was en- [33] gaged in the performance of his duty, and while said plaintiff was working as aforesaid.
>
> "That by reason of the said carelessness and negligence of these defendants, and as a proximate result thereof, this plaintiff slipped on said grease and upon the said deck wherein said plaintiff was engaged in his work, and did thereupon sustain a severe personal injury, to wit, an inguinal hernia, both direct and lateral."

Do you remember that? A. Yes.

(Testimony of Charles Hansen.)

Q. That action was shortly thereafter settled, isn't that correct? A. It was settled.

Q. Now, the second accident was on July 28, 1940, while you were on the "Monterey"?

A. That is correct.

Q. Is that right? A. That is correct.

Q. At that time you fell off a mast and hurt your back? A. Yes, the boom.

Q. You claimed at that time that there was a contusion, and the X-ray at the Marine Hospital showed the fracture of the third, fourth and fifth members of the lumbar side, is that correct?

A. That is correct

Q. That case was settled for $200, plus maintenance, is that correct?

A. I believe it was.

Q. There was no suit filed?

A. No suit filed.

Q. By the way, at the time, or the day of your accident, was there another sailor stationed on the starboard side of the ship, that is, at or about the time you were injured?

A. On the starboard side of the ship?

Q. Yes; to make it more definite, was there a sailor stationed somewhere near where that snatch block on the starboard side of the rigging was that you fixed?

A. There was a sailor on the [34] gypsy head.

Q. That is on the winch?

(Testimony of Charles Hansen.)

A. That is on the winch.

Q. I mean over by the starboard rail, the rigging?

A. No.

Q. There was no sailor there?

A. There was no sailor there.

Q. Do you know whether there was a sailor over there, a little forward of that?

A. No. I had an ordinary seaman help me there, but he had gone forward to take care of the inboard boom, I mean the inboard guy on the forecastle head.

Q. How far was he from that snatch block?

A. Oh, he was up here, I would say probably forty or fifty feet—I would say about forty feet, I did not exactly measure it.

Mr. Burns: That is all.

The Court: We will take a recess for five minutes.

(After recess:)

Mr. Andersen: I would like to call Mr. Jones. I have a little redirect examination of Mr. Hansen, but I would like to call the doctor out of order.

The Court: I wish you would call the Doctor, I have seen him waiting.

Mr. Andersen: Will you take the stand, Dr. Jones?

ROBERT A. JONES,

Called for the Plaintiff; Sworn.

Mr. Andersen: Q. You are a medical doctor?

A. Yes.

Mr. Andersen: You will stipulate to the qualifications of Dr. Jones, will you not, Mr. Burns?

Mr. Burns: Yes.

Mr. Andersen: Q. Dr. Jones, in your capacity as a medical officer in the Marine Hospital, you had occasion to either treat or examine, or keep the records relating to Mr. Hansen's left hand? [35]

A. Yes.

Q. And you have X-rays and certain records that you brought with you? A. Yes.

Q. With respect to the left hand, what do the X-rays show?

A. The X-rays show an ununited fracture of the tip of the third phalanx of the third left metacarpal bones, including a traumatic amputation of the tip of the third phalanx of the fourth left metacarpal bones, together with an ununited fracture of the base of the third phalanx of the second left metacarpal bones, including an ununited fracture of the second phalanx of the left thumb or first left metacarpal bone?

The Court: How many fingers were broken—three? A. Three, and a thumb.

Mr. Andersen: Q. How many fractures were there altogether?

The Court: That would be four.

(Testimony of Robert A. Jones.)

A. They were comminuted, that is, some of them in several pieces.

Mr. Andersen: Q. Comminuted fractures?

A. Yes.

Q. How many fingers had comminuted fractures?

A. I will have to look at the film. The X-ray man did not state that.

Q. Didn't he make any notes?

A. He made notes, but did not state there. The fracture of the second is comminuted. The middle finger is comminuted, and the ring finger shows an amputation of the tip of the third phalanx, and the thumb shows a fracture with a solid separation of the fracture. I would not call the fracture of the distal phalanx comminuted.

Q. What was the type of wound that he had to his hand?

A. I could not state that, because, as I remember, when I saw him at the Marine Hospital his wound had healed.

Q. His wound had healed? A. Yes.

Q. He was an outpatient at the hospital from March 21, 1941, until [36] August 28, 1941, was he?

A. That is correct.

Q. What was his condition upon discharge?

A. I could read my notes of my last examination, which was August 27:

> "A very good result has been obtained. Can flex fingers completely to palm. The ring finger

(Testimony of Robert A. Jones.)

shows a scar at the tip which is somewhat tender. There is a loss of bone at the tip of the distal phalanx of ring finger. There is an early Dupuytren's contracture of palmar fascia of hand. Advise return to work. If ring finger tip too tender patient is to return for a plastic repair of scar."

Dr. O'Connell was in charge of the outpatient.

"Patient is at this time unable to flex completely distal phalanges of second and third fingers on the proximal phalanges."

Released for duty.

Q. Now, the contracture, is that traumatic?

A. There is a great deal of dispute.

Q. That is, medically, you mean?

A. It usually takes quite a while to develop.

Q. What possible sequilla can there be from that contracture?

A. It can develop—it is a sort of hypothetical question, what it can do. It depends on the course of it.

Q. In other words, at the present time you would say it was an uncertain factor, is that it? In other words, it might develop to be very serious and it might not develop into something very serious?

A. I would not want to make any statement on that, because it is hypothetical.

Q. Did you find any evidence of any arthritic

(Testimony of Robert A. Jones.)

changes which might possibly occur for loss of motion of the distal fingers?

A. All I can give you on that is, in the X-ray report, and it says in the last line, "No evidence of arthritic change encountered." That [37] was his last report.

Q. From the report would you say that he had lost a certain amount of strength or grip in his hand?

A. He showed a weakness in his grip at the last examination.

Q. Would you say, Doctor, that the present condition of his hand, that is, the scarring that it has, and the loss of grip, and the inability to flex the ends of the fingers, would you say all of these were caused by this crushing that he received in the month of January, 1941—was that something you could tell from your examination? A. I think so.

Mr. Andersen: That is all.

Cross-Examination

Mr. Burns: Q. There is also the entry, is there not, on the discharge certificate, August 28, 1941, "Released to full duty to return if complications arise." A. That is true.

Q. And Mr. Hansen did not return to the hospital? A. I have not seen him.

Q. If he did return there would be some entry on the record, would there not?

A. Yes, there should have been.

Q. There is no entry to that effect? A. No.

Mr. Burns: Thank you, Doctor.

CHARLES HANSEN,

Recalled;

Redirect Examination

Mr. Andersen: Q. With respect to the questions asked of you by Mr. Burns, relating to previous accidents, and the reading of the deposition, at the time of that deposition was it your intention to conceal any evidence of any injuries, or what was your understanding regarding those questions?

A. It was a misunderstanding. I certainly would not have denied things that [38] I knew in that regard.

Mr. Andersen: That is all.

Mr. Burns: That is all.

PETER LECHT,

Called for the Plaintiff; Sworn.

Mr. Burns: You Honor, I do not like to interrupt, but I have been informed by the representative of the Matson Company that I was in error when I said $296 in maintenance had been paid. It was $396.

The Court: You mentioned $296.

Mr. Burns: I mentioned $296, and $46.75. I am informed it was $396. Perhaps Mr. Andersen will stipulate to that.

Mr. Andersen: I will take your word for it.

Q. What is your occupation, Mr. Lecht?

A. Seaman.

Q. How long have you been a seaman?

(Testimony of Peter Lecht.)

A. 38 years.

Q. Would you speak loud, so that I can hear you? A. 38 years.

Q. And in January of 1941 were you employed by the Matson Company on the "Mauna Lei"?

A. Yes.

Q. What was your job on the boat?

A. I was a boatswain.

Q. You were the boatswain on that trip?

A. Yes.

Q. Do you remember the deckload that was on that boat? A. Yes.

Q. What kind of a deckload was it?

A. Well, there was construction steel. I call them beams.

Q. After the boat left San Francisco, did anything happen to that load of beams? A. Yes.

Q. What happened?

A. Well, that was around eight o'clock.

The Court: Q. You say it was about eight o'clock at night? A. At night.

Q. Where were you?

A. I was in my room. [39]

Q. I know, but at sea where were you?

A. Out of San Francisco.

Q. Near Honolulu?

A. No, close to San Francisco, not long after we left.

Q. Something happened; what happened?

(Testimony of Peter Lecht.)

A. I heard a noise on deck, and I went and took a look at what had happened.

Q. What did you see?

A. And the steel had moved over from one side to the other.

Q. When you say "the steel," you mean the large beams? A. Yes.

Mr. Andersen: Q. Had that deckload of steel been shored? A. No, it was long steel.

Q. I say, had it been shored up, any place, with wood? A. No, there was nothing like that.

Q. How was it held?

A. Well, we had only two lashings, one on each side.

Q. Two chains?

A. Two chains, temporary lashings, they call them.

Q. Temporary lashings? A. Yes.

Q. Did the steel beams remain like that until you got to Honolulu, or were they picked up again?

A. The next morning at 8:00 o'clock we started in to put some wires around.

The Court: Q. Did you get it up in shape again? A. No, we couldn't do that.

Q. You couldn't do that?

A. It was impossible.

Mr. Andersen: Q. Did it remain like that until you got to Honolulu?

A. We even put some lumber between the beams to keep it from moving .

(Testimony of Peter Lecht.)

Q. You put some lumber between the steel to stop the moving of the steel? A. Yes.

Q. When did you do that?

A. And put wire around it.

Q. And put wire around it? A. Yes. [40]

Q. Around the steel? A. Yes.

Q. What kind of wire? A. Winch wire.

Q. You mean small cables? A. Small.

Q. Small wire cables? A. Yes.

Q. Where did you fasten that wire?

A. Where we could.

Q. Wherever you could put it under the steel and fasten it? A. Yes, and put turnbuckles on.

Q. Did the steel move after that?

A. It was moving all the way along.

Q. The whole trip? A. The whole trip.

Q. Who placed that on deck? Did you have anything to do with stowing that cargo on the deck?

A. No.

Q. Who did that? A. The longshoremen.

Q. You say you had been going to sea 38 years?

A. Yes.

Q. Did you ever do any stowing of cargo?

A. Yes, I have been stowing cargo on steam schoolers.

Q. When did you sign on the "Mauna Lei"?

A. Well, on January 6th.

Q. You shipped on January 6th? A. Yes.

The Court: Q. Did you work continuously on the ship? Did you work for some time on the "Mauna Lei"?

(Testimony of Peter Lecht.)

A. That was the first trip then. I was on that ship before.

Q. You had been on that ship before?

A. In 1935.

Q. Did you make more than one trip on here?

A. I made three trips, two more after that.

Q. You were attending the winch, were you?

A. Yes, I was working the winch.

Q. That is, when the accident happened?

A. Yes.

Q. You were at the winch, were you, when the accident happened?

A. I was running the winch.

Mr. Andersen: Q. You remember when they were going to top [41] the booms, do you?

A. Yes.

Q. And you were driving the winches?

A. Yes.

Q. After they started to raise the booms did they continue or did they stop?

A. Well, that is when the boom hit the signal line.

Q. You mean the boom hit the signal line.

A. Yes.

Q. Then did you stop?

A. I stopped the winches.

Q. The chief officer was around there some place, was he not? A. Yes, he was on the port side.

Q. That was Mr. Rosen? A. Yes.

(Testimony of Peter Lecht.)

Q. And after you stopped the boom from going up any further, when they fouled that signal line or halyard, where was Mr. Hansen?

A. Mr. Hansen was behind the cleat.

Q. That cleat is on the mast house?

A. Yes.

Q. Then what did Hansen do, if you saw him do anything?

A. Well, looked on the starboard side and I saw Hansen, and I sent Hansen over there.

The Court: What did you say?

A. I said, "Hansen, take a little line and put a little stop on that so that it can't slip."

Q. You said, "Get a little line and put a stop" on what?

A. On the snatch block on the rigging.

Q. Did he do it? A. Yes.

Mr. Andersen: Q. After he put that stop on the snatch block then what did Hansen do, if you saw?

A. He walked back the same way, to the middle of the deck load, and I saw him no more.

Q. In other words, you saw him get half way back, and that is all you saw?

A. That is all I saw.

Q. Did you see him actually get hurt?

A. No.

Q. You did not? A. No. [42]

Q. With respect to the deck load of steel, Mr. Lecht, to walk on in, were there any walk ways, any wood for a walk way across it? A. No.

(Testimony of Peter Lecht.)

Q. Was it straight, so that you could walk across it?

A. No, it was sticking up in all directions.

Q. Now, around where you were working, and around the deck, was there any oil around there, or not?

A. Well, we turned to at 1:00 o'clock, or after 1:00, I think it was, and the deck engineer always oils the winches before I touch them.

Q. Was there any oil around there before Hansen got hurt?

A. Well, there was oil all around there, it is always around there.

The Court: Q. There is always oil around there? A. Always oil around there.

Mr. Andersen: Q. At the time that you were topping these booms, what was the condition of the sea?

A. Well, there was a northwest ground swell.

Mr. Andersen: That is all.

Cross-Examination

Mr. Burns: Mr. Lecht, on the day of this accident you say that you told Mr. Andersen—Withdraw that. You say that you were working at the winches and you were standing between the two winches?

A. Yes.

Q. These winches are known as the No. 1 winch?

A. That is right.

Q. And there is one for the starboard boom and one for the port boom? A. Yes.

(Testimony of Peter Lecht.)

Q. You were facing forward? A. Yes.

Q. You were about in the middle of the ship?

A. About the middle of the ship.

Q. You had one hand on one lever and the other hand on the other lever? A. Yes. [43]

Q. And the mate gives the order to heave away, is that right? A. The mate is my boss.

Q. When he gives the order to heave away, you say, "Everybody clear"? A. Yes.

Q. And then you give her the steam?

A. Yes.

Q. And the boom starts to go up? A. Yes.

Q. When the booms got up to a certain point the booms fouled, you say? A. Yes.

Q. They fouled on what?

A. On that signal halyard, on the anchor light halyard.

Q. Some rope up on the top?

A. The anchor light line.

Q. Then what did you do, stop the booms?

A. Yes.

Q. During all of that time Hansen was standing by the starboard cleat, by the mast house?

A. Yes.

Q. Starboard side? A. Yes.

Q. Slacking away? A. Yes.

Q. Then you say that you told Hansen to do something? A. Yes.

Q. What did you tell him to do?

(Testimony of Peter Lecht.)

A. I said to take a little line and put a stopper on that so that it couldn't slip.

Q. On which side? A. Starboard side.

Q. You told Hansen to go over and fix it?

A. Yes.

Q. Then after he fixed it did you see him go back?

A. To the middle of the deckload, that is all I could see.

Q. You are sure this was on the starboard side, not the port side? A. The starboard side.

Q. Nothing happened to the block on the port side?

A. I didn't see anything happen there.

Q. If it had happened you would have known about it? A. Yes.

The Court: Q. You were facing forward?

A. Yes.

Q. You could only see Hansen part of the way coming back? [44]

A. Part of the way, to the middle of the deckload.

Mr. Burns: Q. Didn't you see Hansen come back and take his place by the cleat?

A. No, he disappeared.

Q. Didn't you see him come back and take his place by the cleat?

A. No, he was in the middle of the deckload, that is when I seen him last.

(Testimony of Peter Lecht.)

Q. How long did you wait, then, before you started the winches again?

A. Well, the mate gave me orders, "All clear."

Q. "All clear"? A. Yes.

Q. Then what did you do?

A. Then I started the booms up again.

Q. How long was that after you last saw Hansen? A. I don't know how long it was.

Q. One or two minutes? A. Yes.

Q. In other words, you saw Hansen coming back? A. Yes.

Q. Then one or two minutes later the mate said "All clear"? A. Yes.

Q. And you started the winches again?

A. Yes.

Q. After you started the winches, just a second after, you heard him holler?

A. I didn't hear him holler.

Q. Somebody hollered?

A. Somebody hollered, and I could feel something was in the winch.

Q. You mean you could feel something was caught? A. Yes.

Q. Then you stopped the winch?

A. As soon as I thought somebody was hurt I stopped again.

Q. You are absolutely certain, Mr. Lecht, that you did not see him come back to the cleat?

A. No.

Q. You did not?

(Testimony of Peter Lecht.)

A. I saw him come back to the middle of the load.

Q. You did not see him come back and take hold of that guy?

A. No, he was behind that mast house. [45]

Q. I am going to show you page 31, line 16 of your deposition.

The Court: Mr. Burns, I have an engagement, and I will have to continue the trial until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [46]

Afternoon Session
2:00 O'Clock P. M.

The Court: You may proceed.

PETER LECHT,

Recalled;

Cross-Examination
(Resumed)

Mr. Burns: Q. Mr. Lecht, I will hand you a copy of the deposition of Peter Lecht, taken on Saturday, April 11, 1942, and direct your attention to page 31, line 16, and ask you to read from that point to line 17 on page 32.

Mr. Andersen: I am going to object to the reading of this, on the ground, as I understand the question, Mr. Burns was interrogating him on the block

(Testimony of Peter Lecht.)

on the side of the mast house, and this testimony shows he refers to the block on the rigging on the outboard side.

The Court: Overruled. Go ahead.

Mr. Burns: Q. Just read that to yourself. Can't you read it without glasses? A. No.

Q. I will read it to you, then, starting at line 16, page 31:

"Q. And did you watch him as he went over there to fix it? A. I was looking at him.

"Q. You were looking at him?

"A. Yes.

"Q. And did you see him fix it?

"A. Yes.

"Q. And what did he do—raise the block up on the rigging?

"A. He pushed it higher up.

"Q. So that it wouldn't rub the deckload?

"A. Yes.

"Q. So that the topping lift wouldn't rub on the deckload? A. Yes.

"Q. And did you see him go back to his place?

"A. That was the last I saw of him.

"Q. That was the last you saw of him?

"A. Yes. [47]

"Q. Well, did you see him coming back over the steel? A. Yes, sir.

"Q. And you saw him come back to his place by the mast house?

(Testimony of Peter Lecht.)

"A. Yes; and when he went behind the mast house he took hold of the guy, there.

"Q. He took hold of the guy, is that right?

"A. Yes.

"Q. And his job, when he got back to the mast house, was to slack away on the starboard guy, is that not right? A. Yes.

"Q. And that starboard guy was around a cleat, there? A. Yes.

"Q. And then after he got back to the mast house and took ahold of the guy, that was the last you saw of him, is that right? I mean at that time you didn't look at him any more?

"A. No; I couldn't see him through the mast house.

"Q. The mast house was between you, is that right? A. Yes."

Mr. Lecht, you so testified, did you not, on your deposition?

A. I did not see him go to the mast house, I just saw him on the deckload.

Mr. Burns: You will stipulate he so testified in the deposition?

Mr. Andersen: I will stipulate that those questions were asked and those answers were given, and, furthermore, his testimony, if you will read along, will show he did not see him, because the mast house was there.

Mr. Burns: I did not ask for an argument on that. The Court will judge that.

(Testimony of Peter Lecht.)

Q. You recall testifying, don't you, Mr. Lecht, that you saw him come back to his place by the mast house?

A. Yes, and he went behind the mast house—I didn't see him go back to the mast house, I just saw him on the deckload, I couldn't see through there where he went down. [48]

Q. You didn't see him go back and take hold of the guy?

A. I saw him going back on the deckload, that is as far as I could see him.

Q. That is as far as you could see him?

A. Yes.

Q. But you won't testify that you saw him take hold of the guy?

A. I didn't say that, but I couldn't see him take hold of the guy.

Q. Do you know whether he did go back and take hold of the guy?

A. He walked over toward the mast house, and he was behind the mast house.

The Court: Q. You don't know whether he took hold of it, nor not?

A. No, I couldn't see it.

Mr. Burns: Q. You say that the block on the starboard side of the rigging slipped?

A. Yes.

Q. The one on the port wing did not slip?

A. I didn't look at that very much, and I didn't

(Testimony of Peter Lecht.)

see that. Mr. Rosen, the chief officer, was on the port side.

Q. I will read you your testimony on page 30, line 25, running over to page 31, line 2:

"Q. Did anything happen to the block on the port rigging?

"A. Nothing happened there, no.

"Q. Nothing happened on the port side?

"A. No, sir."

Now, you testified to that in your deposition, didn't you? A. Yes.

Q. Mr. Lecht, this is your statement which is attached to your deposition, isn't it?

A. Yes.

Q. That is your signature, isn't it?

A. That is mine.

Q. And you read this statement before you signed it? I will read this to you, if I may:

"My name is Peter Lecht. I am employed as boatswain on the S. S. 'Mauna Lei,' and was so employed on January 15, 1941, when [49] A. B. Hansen hurt his hand. I have read the above statement by Chief Officer Rosen, and do not find anything wrong with his statement, that is, to the best of my knowledge. I was driving the winches at the time; my back was turned to where Hansen was working, and therefore I did not see how it happened."

You read that, didn't you, before you signed it?

A. Yes.

(Testimony of Peter Lecht.)

Q. Now, I will read to you the statement of Mr. Rosen:

"My name is A. M. Rosen. I am employed as Chief Officer on the S. S. 'Mauna Lei,' and was so employed on or about January 15, 1941, when Mr. Charles Hansen, A. B., sustained injuries to his left hand.

"To the best of my knowledge this accident happened as follows:

"While start hoisting No. 1 booms, every man was placed in proper position, and A. B. Seaman Hansen was to tend to the starboard outside guy. When everything was ready, both booms were hoisted up about six feet, and then it was found that the topping lift of the port boom was chafing on sharp steel. Port boom had to be lowered back in the boom rest, to adjust the block, and the starboard boom was held in position about six feet up from the boom rest, and the men handling starboard boom stayed in their places while port boom block was being adjusted. It took about four minutes to make this adjustment, and then I gave the boatswain orders to proceed heaving up both booms.

"The boatswain started heaving up both booms and Hansen got his hand in the starboard side topping lift snatch block. How he did this, I don't know. I did not see it, and nobody else saw it.

(Testimony of Peter Lecht.)

"This particular location where Hansen was working was in its usual condition, that is, it was not any greasier than it is [50] at any time. In fact, the sea had washed off most of the dirt and grease a few days previous, and the deck was pretty clean and dry.

"As to the shifting of the deck load, it is admitted that the load did shift some, but there was plenty of room for Hansen to work in safely. We had bad weather and rough sea before this, and this caused the cargo to shift. When we were hoisting the booms the sea was not rough, although there were still slight rolls."

It is signed by A. M. Rosen. You read this statement of Rosen, did you not, before you signed your name? A. Well, I asked some questions.

Q. Did you read this statement that I just read to you, by Mr. Rosen? A. Yes.

Q. You read it? A. Yes.

Q. In that statement it says that the topping lift on the port boom slipped.

A. Well, I was doing my work, and I couldn't look around.

Q. You don't know? A. No.

Q. Did they lower the port boom into the boom rest? A. I don't remember that.

Q. Did you lower the starboard boom into the boom rest? A. No.

Q. Don't you have to lower the boom before you can adjust that snatch block?

(Testimony of Peter Lecht.)

A. It is not necessary.

Q. So, when you signed this statement and said that you did not find anything wrong with the statement to the best of your knowledge, you wish to change that now, do you?

A. I did not see when the man got hurt.

Q. You did not see when the man got hurt?

A. I just saw him on the deck load. [51]

Q. You read English, though, don't you?

A. Yes.

Q. You do not have any difficulty reading English? A. No.

Mr. Burns: I think that is all.

Redirect Examination.

Mr. Andersen: Q. Just one or two questions that I overlooked. When the ship got into Honolulu, did you take the hatch covers off right away, or what did you do first?

A. We just tied up the ship and the longshoremen came aboard the ship.

Q. In taking the rigging out of the hold, the lines out of the hold, what did you do?

A. Well, we got the hatches open and got the lines up that way.

Q. How did you get the hatch open?

A. You can get a corner open, there are three sections in one.

Q. I mean, was this steel on the hatch, or was it not?

(Testimony of Peter Lecht.)

A. It was hanging on that chain, hanging down, it was moved a little bit.

Q. In other words, had the steel cargo fallen over so far on No. 1 and No. 2 hatch that they could not take the covers off until they moved the steel?

A. I didn't look at that, particularly.

Q. You didn't look at that?

A. I just got the lines up.

Q. How close to the hatches did the steel come after it had fallen over?

A. Some was further out and some was closer in.

Q. You remember these steam pipes alongside of the mast house, that are shown in the picture, Plaintiff's Exhibit 1, you know the picture that you saw? A. Yes.

Q. There were some covers over those pipes?

A. Yes.

Mr. Burns: You mean hatch covers?

Mr. Andersen: No, pipe covers, over the steam pipes. When the steel fell over did it cover those pipes, or did it [52] not cover those pipes?

A. Well, some of the turnbuckles, some of them were bent and the steel was hanging over.

Q. Was it hanging over the steam guards?

A. Yes, it was, more or less.

Q. Now, just one more question, was Mr. Hansen a good worker?

Mr. Burns: Just a moment. That calls for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Andersen: That is all. We rest, your Honor.

Mr. Burns: That this time I wish to move for a directed verdict under Rule 50-A of the Federal Rules of Civil Procedure, on the ground that the evidence is insufficient to sustain a judgment in favor of the plaintiff, reserving the right to introduce evidence if the motion is denied.

The Court: Denied.

Mr. Burns: I will call Captain Monroe.

The Court: I think your motion should have been made under Rule 41-B.

Mr. Burns: I am sorry, I thought it was Rule 50-A.

The Court: No. It says 41-B: "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal upon the ground that upon the facts and the law the plaintiff has shown no right to relief."

Mr. Burns: May I have the record to show that?

The Court: Sure, you may have the benefit of that.

GEORGE MONROE,

Called for the Defendant; Sworn.

Mr. Burns: Q. Where do you live, Captain?

A. 656 O'Farrell [53] street, San Francisco.

Q. What is your occupation?

(Testimony of George Monroe.)

A. Stevedore superintendent of the Matson Navigation company.

Q. Do you hold a master's license, Captain?

A. I do.

Q. How long have you held a master's license?

A. Since 1926.

Q. Since 1926? A. Yes.

Q. Before you became superintendent of stevedores, at least some years in the past you went to sea, did you? A. I did.

Q. How many years did you go to sea?

A. 22 years.

Q. You started in the deck department, did you?

A. In the deck department.

Q. And you worked your way up?

A. Yes.

Q. At the present time you are superintendent of stevedores, is that correct? A. Yes.

Q. Directing your attention to January, 1941, I will ask you if you were assistant superintendent of stevedores at that time? A. I was.

Q. And the superintendent of stevedores was Captain Iverson, is that correct? A. Yes.

Q. He is dead, now? A. He is dead.

Q. As assistant superintendent of stevedores, did you have any connection with the loading of the S. S. "Mauna Lei" during January, 1941?

A. I did.

Q. I will hand you a drawing which is labeled, "Cargo stowage, Matson Navigation Company, S. S.

(Testimony of George Monroe.)

'Mauna Lei' Voyage 137, January, 1941," and ask you if that is the stowage plan for the voyage beginning on or about January 7, 1941?

A. That is it.

Q. On that voyage, Captain, was there a deck cargo carried?

A. There was a deck cargo carried.

Q. What was the deck cargo?

A. The deck cargo consisted of [54] various steel beams and bundles of reinforcing iron for the United States Army Engineers, and cargo for various consignees in the Hawaiian Islands.

Q. Those steel beams were I-beams, were they?

A. I-beams, yes.

Q. About how long were they?

A. They were 40 to 60 feet long.

Q. And they weighed approximately how much?

A. Approximately two tons.

Q. How were those beams stowed in the ship, or how were they loaded?

A. They were loaded on the deck of the vessel, alongside the hatches, alongside the No. 1 and No. 2 hatches; they were also loaded on top of four inches of dunnage, to give sufficient space in which the chains could be properly passed and secured, and they are also flush against the side of the steam guard—the guard of the steam pipe—and then out to the ship's side.

Q. Out to the ship's side? A. Yes.

Q. The beams run fore-and-aft?

(Testimony of George Monroe.)

A. The beams run fore-and-aft to the hatch coaming on each side of the vessel.

Q. How was this deck cargo of steel beams and reinforcing steel made fast?

A. It was made fast by chain lashings.

Q. Just describe what those chain lashings are.

A. Those lashings are chains, one-half inch diameter chains, 40 feet long, with a turnbuckle at the end. One end is secured and shackeled to an eye in the fish plate, which is the angle iron at the side of the ship, and then again to another fish eye on the hatch coaming, or the guard.

Q. How many of these chains were used on this deck load?

A. On the starboard there was No. 1 and 2—there were four chains at least on each side, and these chains were supplemented by five-inch wire cable woven around it. [55]

Q. Were they also fastened to something?

A. They were also fastened to fish eyes in the deck.

Q. The turnbuckles on these steel chains tightened, did they? A. They tightened, yes.

Q. Now, was there any shoring, wood shoring of this steel deck cargo?

A. No, there was no shoring, it is not generally customary.

Mr. Andersen: I object to that as not responsive.

Mr. Burns: I will ask it this way:

Q. In your experience, have you——

(Testimony of George Monroe.)

The Court: He answered there was no shoring. That part is responsive.

Mr. Burns: Now, I will qualify him as a man familiar with the custom of the sea.

The Court: Yes.

Mr. Burns: Q. Have you supervised and engaged in the act of lashing deck cargoes before this particular operation? A. I have.

Q. How many years have you done that?

A. Seven or eight years.

Q. Did you also do it while you were going to sea? A. While I was going to sea, too.

Q. Directing your attention to ships of the character of the "Mauna Lei," I will ask you, first, is it customary to carry deck cargo? A. Yes.

Q. And in regard to these particular steel beams, would it have been possible to stow them below?

A. No, these beams are longer than the size of the hatches.

Q. In ships of this type, what is the custom in regard to stowing deckloads of steel beams?

Mr. Andersen: May I object to this on this basis, that I do feel it makes much difference in a case of this kind what the [56] custom might be.

The Court: That may be so, but I will overrule your objection.

A. It is not possible to shore cargo.

The Court: You are asked what the custom was.

Mr. Burns: What is the custom?

A. The custom is not to shore it.

(Testimony of George Monroe.)

Q. Will you tell us whether or not such a deck-load, from your experience, can be shored?

A. No, not in a ship of that type.

Q. Why not?

A. Because she has not fixed bulwarks.

Q. What do mean by fixed bulwarks?

A. Big iron bulwarks on the side of the ship.

Q. You mean on the edges of the ship?

A. On the edges of the ship.

Q. She extends up a certain height?

A. She extends up a certain height.

Q. What would you say with regard to the manner in which the deck cargo of the "Mauna Lei", in January, 1941, was stowed, was it stowed in a safe and seamanlike manner? A. Perfectly.

Mr. Andersen: I move that that be stricken out—I did not have any opportunity to object before the answer—on the ground there is no showing, as I understand it, that this witness even saw the cargo.

Mr. Burns: I think he said he did.

A. I did.

The Court: Q. Was the cargo on the deck stowed under your supervision?

A. Yes, under my general supervision.

Q. You were there? A. I was there, yes.

Q. You saw it? A. I saw it.

Q. You saw it after it was stowed?

A. I saw it after it was stowed. [57]

The Court: Overruled.

Mr. Burns: One other thing: In regard to the

(Testimony of George Monroe.)

draft of the ship after this was loaded, is that shown on the diagram, that is, how high out of the water in front and back?

A. Yes, it shows the draft of the vessel forward, with 25 feet 5 inches, and aft 33 feet 10 inches.

Q. Will you just explain what that means?

A. It means that the after end of the ship was eight feet five inches lower than the forward end, giving extra buoyancy forward, and putting the ship in a perfectly stable condition, and trim.

Q. Did that have any effect on taking seas?

A. Yes, that would tend to decrease the amount of seas that would be taken over the forepart of the vessel.

Mr. Burns: I will offer this cargo stowage plan in evidence as Defendant's Exhibit A.

The Court: Admitted.

(The cargo plan was marked "Defendant's Exhibit A.")

Mr. Burns: That is all.

Cross-Examination

Mr. Andersen: Q. You had quite a large deckload of steel, didn't you?

A. Not any more than ordinary.

The Court: Q. Was it a large deckload? You were asked if you had a large deckload of steel.

A. I would not say it was a large one.

Mr. Andersen: Q. You would not say it was

(Testimony of George Monroe.)

a large one. You used all of the deck space available, didn't you?

A. We used all of the deck space available.

Q. All of the deck space available?

A. All of it, yes.

Q. Now, I understand you to state you could not shore those beams.

A. I said we couldn't shore the beams. [58]

Q. You mean it was impossible?

A. It was not necessary.

The Court: No, you were asked if you could shore the beams. He did not ask you if it was necessary, but you were asked if you could.

A. We could not shore the beams and make it any more secure than it was.

Mr. Andersen: That is not what you are asked, it is not responsive.

The Court: Could you shore the beams?

A. No.

Mr. Andersen: Q. You mean by that that it was impossible to shore the beams?

A. It was impossible to shore the beams.

Q. You are sure you know what I am talking about? I am talking about shoring. Let me draw a picture of a boat, if I may. You have a gunwale there on the ship?

A. What do you mean by a gunwale?

Q. You have a fish plate?

A. We have a fish plate.

Q. In other words, fore-and-aft outboard you have a fish plate? A. We have a fish plate.

(Testimony of George Monroe.)

Q. How high is that off the deck—about six inches? A. Between six and eight inches.

Q. Between six and eight inches? A. Yes.

Q. Off the deck? A. Yes.

Q. There are about five angle irons, above five ¾-inch angle irons? A. Yes.

Q. On each side, that goes fore-and-aft, doesn't it? A. Yes.

Q. Is that right? A. Yes.

Q. We will say here are the two hatches, 1 and 2.

A. Yes.

Q. And in here is where you had this steel, is that correct? A. Correct.

Q. Here is your fish plate, here, is that right?

A. Correct. [59]

Q. That is a fish plate? A. Yes.

Q. Now, your steel was in here, some place?

A. The steel was there.

Q. Why couldn't you have shored that? Will you explain to me, please, why you could not have shored it; come and show me? Tell me how it was impossible to shore that load?

A. Do you want to suggest?

Q. No, I do not want to suggest, I want you to tell me how it was impossible to shore that.

A. There would not be sufficient support here, to take care of anything for the proper shoring of this.

Q. When you shore a load you put a beam up here, don't you, about a 4 by 12?

(Testimony of George Monroe.)

A. 2 by 12. Where are you securing it to?

Q. You can secure it here, can't you, by a wedge, and here is a fish plate.

A. The steel is secured here alongside of the steam pipe guards and alongside the bitts.

Q. Let us confine ourselves to the outboard side. We have a distance of about 40 or 60 feet. You did not have it all along the outboard side, did you?

A. No.

Q. As a matter of fact, there were not any bitts in there, at all, were there?

A. There were bitts right in here.

Q. I am asking you, on the outboard side, we have not reached the inboard side yet, if it was impossible to shore that load.

A. The shoring you would put in there would not be a suitable operation.

Q. I am just asking you if it would be impossible to shore. Was it impossible to shore that deckload?

Mr. Burns: Do you mean would it be possible to put it up and possible to have it hold, or what?

A. That is what I want to know, is it supposed to be put up there [60] and be sure that it would remain in position?

The Court: You are asking a question. You can explain that afterward if you wish. You are asked if it would be impossible to shore that load.

A. In my opinion, Judge, it would be impossible to make a good job.

Q. But it could be shored, I suppose?

(Testimony of George Monroe.)

A. The stakes could be put in there but I do not think it would be a satisfactory job.

Q. You don't think it would have held?

A. I do not think it would have held.

Mr. Andersen: Q. Let me ask you this: Considering the lashings that you put around the deck-load, don't you think that if in addition to the lashings you had shoreing that the load would not have shifted as much as it did?

A. No, I don't think so.

Q. You don't think so? A. No.

Q. Now, let us talk about the inboard side. We will say this is the mast house. You recall the mast house there, don't you? A. I do.

Q. You recall the block with a hook on the side of the mast house? A. Yes.

Q. Then you know that we have hatches up here?

A. Yes.

Q. And we have a coaming that extends about two feet? A. Yes.

Q. And here is another hatch, back here. This load came along here, some place? A. Yes.

Q. Now, you could have shored that very readily, couldn't you, very simply, couldn't you? For instance, if you had made——

Mr. Burns: Let him answer.

Mr. Andersen: Go ahead.

A. This, here, is entirely alongside the steam pipe guard, here is [61] your hatch, here is your steam pipe guard. Here it was flush against this, and it remained so the whole time.

(Testimony of George Monroe.)

Q. That load of steel, it has been testified, was between five and six feet high. You know that, don't you?

A. No, I would say four and a half feet.

Q. You would say four and a half feet. How high is that coaming around the hatch?

A. The coaming around the hatch is about two feet.

Q. There was about three feet of steel above the hatch coaming. Why couldn't you have shored that here, and here, here and here? Why couldn't you have shored that? What would have prevented you from shoring it so it absolutely could not fall, or let me withdraw that and put it this way: Why would it be impossible to have shored that on the inboard side? You said it was impossible to shore it. Tell me why it was impossible.

A. The shoring that you put in there would take care of the height of the hatch coaming, and above that, stakes above there would not be any use. They would take care of it to the height of the hatches, and above that is taken care of by the chain lashings.

Q. You loaded the steel right up to the side of the hatch, didn't you?

A. No, the steam pipe guard, about two feet.

Q. Would it not have been a very simple matter—if I may take this off and put it to you in another way—we will say this is your hatch, and there is your deck; is that clear? A. Yes.

(Testimony of George Monroe.)

Q. This is about two feet, here? A. Yes.

Q. And here is your steel coming up there, is it not? A. Yes.

Q. And in here, running the other way?

A. Yes.

Q. Wouldn't it have been a very simple matter to take a piece of shoring and put in here, and then run a 6 by 6 up and shore it in there? Wouldn't it have been a simple matter to do that, [62] and wouldn't it have prevented the steel from falling over? A. No.

Q. Is it impossible?

A. No, it is not impossible, but the question is would that shoring have held.

Q. You did not try to do any shoring, did you?

A. We did not do any shoring, no.

Q. Tell me the approximate total tonnage loaded on the starboard side of that steel.

A. The approximate total tonnage would be about 70 tons, I guess.

Q. You had about three or four chain lashings?

A. Four chain lashings lashing that.

Q. It was about four and a half to five feet high?

A. About four and a half feet.

Q. You never made any attempt to shore it with wood? A. There was no shoring, no.

Mr. Andersen: That is all.

Redirect Examination

Mr. Burns: Q. How much, approximately, did each one of these steel beams weigh?

(Testimony of George Monroe.)

A. Approximately two tons.

Q. And the manner in which they were loaded—they were I-beams, were they not?

A. They were I-beams.

Q. And were the I-beams placed in any particular way?

A. Yes, they were placed so that they interlocked.

Q. The edges interlocked?

A. Yes, the edges interlocked.

Mr. Burns: That is all.

Mr. Andersen: That is all.

ALBERT M. ROSEN,

Called for the Defendant; Sworn.

Mr. Burns: Q. Where do you live, Mr. Rosen?

A. I live in [63] San Francisco.

Q. Whereabouts?

A. 284 Ellington Avenue.

Q. Your occupation is chief mate of the "Mauna Lei", is that correct? A. Yes.

Q. How long have you been chief mate of that ship?

A. I have been about four years.

Q. How long have you been going to sea, Mr. Rosen? A. Over 40 years.

Q. Did you start out as an able seaman, or as an ordinary seaman? A. As an ordinary seaman.

(Testimony of Albert M. Rosen.)

Q. And you worked your way up to your present position, is that correct? A. Yes.

Q. Now, you worked in sailing ships, also?

A. I have, as an ordinary and able bodied seaman.

Q. And you have held a license for how many years, approximately? A. Since 1917.

Q. Calling your attention to the month of January, 1941, you were chief officer on the "Mauna Lei" at that time, were you not? A. Yes.

Q. And on or about January 7th or 8th, the day the ship left San Francisco, I will ask you if you recall the deckload that was on board ship at that time. A. Yes.

Q. Did you have anything to do with that deckload, that is, making it fast, or loading it, or securing it? A. Yes.

Q. What was your job in that connection?

A. My job was to see that the deckload was stowed and secured the best we could.

The Court: Q. Was that your duty?

A. Yes.

Mr. Burns: Q. Will you describe how the deckload was loaded and made fast on the ship?

A. The deckload was loaded fore-and-aft from the hatch coaming to the side of the ship, to these [64] steam pipe guards that were extending out, and it was secured by chain lashings; we had two chain lashings on each side all the way around over the load, from the ship's side to the hatch coaming, with turnbuckles in between to heave it tight.

(Testimony of Albert M. Rosen.)

Q. Those were the wires, is that it?

A. No. Then we also had additional wire lashings in the same way.

Q. This deckload was steel beams and reinforcing bars? A. That is right.

Q. Is that right? A. Yes.

Q. Now, Mr. Rosen, have you been on ships carrying deck cargoes before?

A. Most always all ships carry deck cargoes.

Q. Is it customary for freighters to carry a deck cargo? A. Yes.

Q. Now, you examined this deck cargo, is that correct? A. I did.

Q. And are you familiar with the custom as to loading and making fast of deck cargoes of this type? A. That is right.

Q. And was this load made fast in the customary manner?

A. Like we always have done it.

Q. I will hand you the log of the ship—you have seen this log, Counsel—Directing attention to the entries made on January 8th in the log, I will ask you to tell us by refreshing your memory from the log what time you left Pier 30? By the way, that is where the steel beams were loaded, at Pier 30?

A. Pier 30.

Q. What time did you leave the pier, and where did you go?

A. We left Pier 30 at 1:45— Just a minute, we let go of the lines at 1:00 p.m. and we anchored

(Testimony of Albert M. Rosen.)

at 1:38 at the Powder Anchorage, to load some dynamite.

Q. Did you load dynamite that afternoon?

A. Yes, we loaded dynamite that afternoon.

Q. How long were you there?

A. We laid there until 5:00 o'clock—[65] at 4:56 started heaving anchor.

Q. What time did you leave San Francisco, or leave the Bay?

A. Well, we got outside—we hove anchor and proceeded out to sea, and we got to the light vessel at 7:00 o'clock, 7:04, to be exact.

Q. Mr. Rosen, was there any emergency about leaving, were you in any hurry to leave?

A. No, we had everything secured, as far as we could secure it, we got everything in shape.

Mr. Andersen: We move that be stricken as not responsive.

The Court: It may go out.

Mr. Burns: Q. These lashings on the deck cargo, were they temporary lashings?

A. No, they were lashings that we thought sufficient lashings, should have been sufficient for the voyage.

The Court: There has been testimony here that they were temporary lashings.

Mr. Burns: Q. Were they temporary lashings, or not? A. No.

Q. Were they any different lashings than are normally placed on any deckloads of vessels of that type?

(Testimony of Albert M. Rosen.)

Mr. Andersen: May I object to that on the ground it calls for a conclusion.

A. No different. We had extra wires that were additional to our regular chain lashings.

Mr. Burns: Q. I mean, were these lashings the customary type of lashings for deckloads of that type?

A. Yes, proper lashings for it.

Q. When you got outside the heads, or whatever it is called, did you run into any rough weather that night?

A. Yes, that night we run into bad weather, when we got outside of the Farallones.

Q. Could you tell from the log what time it was, and what kind of [66] weather it was?

A. Here it says we left the light vessel at 7:00 o'clock, and two hours after that the ship was rolling heavy, bad weather, shifted deck cargo under heavy rolls.

Q. Heavy rolls, that was at what time?

A. At 9:00 p.m. to midnight.

Q. Is there any entry as to taking seas over the bow?

A. Oh, yes.

Q. When was that?

A. Between 4:00 and 8:00 in the morning. I have got my own entry here, "Vessel rolling heavily and taking heavy seas over the deck fore and aft."

Q. Fore and aft? A. Yes.

Q. At that time is there an indication of the wind

(Testimony of Albert M. Rosen.)

on the Beaufort Scale?

A. Yes, the wind at 4:00 o'clock was Force 8, and at 7:00 o'clock in the morning Force 7.

Q. What is Force 8 on the Beaufort Scale?

A. Force 8 is a strong gale.

Q. That is on the Beaufort Scale, is it not?

A. Beaufort Scale.

Q. Force 7 is what, a light gale?

A. A moderate gale, or a light gale, yes.

Q. In regard to the cargo aft, did anything happen to that from the sea?

A. Yes, the cargo aft, the seas came over so heavy it flattened the welded steel pipes—we had pipes about 16 inches in diameter and the seas hit them so hard it flattened them down about one-third, or more.

Q. There is an entry there that the deck cargo forward shifted, is that correct? A. Yes.

Q. Just what was the extent of the shifting?

A. Well, they just rolled and loosened up in between the lashings.

Q. What did you do, if anything, about that?

A. Well, next day we went and tightened up on the lashings, and did the best we could, and also I remember the carpenter put some hatch boards in [67] between the deck cargo on the port side, where there were loose holes in between the steel.

Q. In between the steel beams? A. Yes.

Q. Mr. Rosen, from your experience at sea, is it possible to secure a deck cargo so that water coming over the bow will not disturb it? A. No.

(Testimony of Albert M. Rosen.)

Mr. Andersen: I object to that as speculative

The Court: Sustained.

Mr. Burns: Q. Directing your attention to January 15, 1941, were you present on deck at the time that Hansen had his accident? A. Yes.

Q. And what time did you turn the crew to that day, about?

A. 1:00 o'clock we started raising the booms.

Q. Was the whole crew out?

A. All the crew.

Q. All the crew out there? A. Yes.

Q. Who was in charge there?

A. I was in charge.

Q. You were in charge?

A. Yes, and the boatswain assisted.

Q. An the boatswain assisted? A. Yes.

Q. Did anyone give the men their places?

A. All the men were told to go on certain places.

Q. Who told them that?

A. That was my order.

Q. Your order? A. Yes.

Q. Do you remember where Hansen was placed?

A. Hansen was placed at the starboard No. 1 guy, outboard guy.

Q. What was his job there, what was he supposed to do?

A. His job was to slack away on the guy while we were raising up the booms.

Q. The guy, as I understand it, is a brace or snub on the boom? A. Yes.

(Testimony of Albert M. Rosen.)

Q. To keep it from swinging? A. Yes. [68]

Q. He was to slack away as the boom came up out of the cradle, is that right?

A. That is right.

Q. After all of the men were placed in their positions, did you give orders to raise the boom?

A. I gave the orders to the boatswain.

Q. How did you give the order?

A. Told him to "Heave away."

Q. Did you tell it, or say it?

A. I am just yelling or speaking plenty loud so that everybody naturally hears and he starts his winches.

Q. And the boastwain was facing you, is that correct? A. He was facing me.

Q. Where were you standing?

A. I was standing on the hatch.

Q. What hatch?

A. No. 1 hatch, facing aft.

Q. Facing aft? A. Yes.

Q. The boatswain was facing you between the two winches, is that right?

A. Between the two winches, facing forward.

Q. You gave the order to "Heave away," and then what happened?

A. We raised the booms up about maybe six feet, and the snatch block leading from the deck—we had a snatch block in the rigging.

Q. What happened?

A. The one on the port side slid down and we

(Testimony of Albert M. Rosen.)

had to stop heaving and lower down the port boom back into its cradle, or the boom rest, whatever you want to call it—we call it the boom rest or cradle.

Q. What about the snatch block on the starboard side?

A. On the starboard side it was all right; we did not have to lower the starboard boom, at all.

Q. You say that the snatch block on the port side had slid down on the rigging? A. Yes.

Q. And you lowered the port boom down to the cradle? A. Yes. [69]

Q. How about the starboard boom?

A. The starboard boom stayed in its place, and I said to "Hold everything the way it is." Then we adjusted the snatch block on the port boom, and we took the lift back to the gypsy head, and I got on the load and said, "Heave away, Boatswain," and he said, All clear," and started heaving.

Q. Then after he started heaving, what happened?

A. All at once I heard Hansen holler, "Ouch," when we had been heaving, and I seen him take his hand out from the snatch block.

Q. You stopped the boom, or did the boatswain stop the boom?

A. The boatswain stopped heaving right there.

Q. Then Hansen went up to the bridge, is that right?

A. He went up to the bridge.

Q. Up to the bridge, is that right?

(Testimony of Albert M. Rosen.)

A. Up to the bridge.

Q. Directing your attention to the block on the starboard rigging, was anything done to that?

A. Nothing at all, it was all right.

Q. When the booms were stopped, and you were fixing the boom on the port side, was there anything done to the block on the starboard side?

A. No.

Q. Had that block slipped on the starboard side?

A. No, not on the starboard side, it did not slip.

Q. Might I ask you this: From your experience, and your knowledge of these matters, is it necessary to lower the boom into the cradle before you can fix the blocks?

A. Well, taking the strain off, you can get the strain off the topping lift.

Q. You have to take the strain off?

A. If the boom hangs on you can't fix any block.

Q. In other words, this block on the starboard side, with the topping lift on the starboard rigging, the topping lift was running [70] through that?

A. Yes.

Q. And the starboard boom was lifted out of the cradle seven or eight feet, is that right? A. Yes.

Q. Or how many feet?

A. Six feet to ten feet, I couldn't say exactly.

Q. The line holding that boom was running through this block on the starboard rigging, is that correct? A. That is right.

(Testimony of Albert M. Rosen.)

Q. And you say that in order to fix that block it is necessary to let the boom down?

A. Yes, let the boom down, or put a stop on it.

Mr. Andersen: I move to strike that out as leading.

The Court: Denied. It is leading, however.

Mr. Burns: Q. Directing your attention to just before Mr. Hansen's accident, and while the block on the port rigging was being fixed, did you give Mr. Hansen any orders to go over to the starboard rigging? A. No.

Q. Did Mr. Lecht, the boatswain, give him any orders to go over there?

A. No, I did not hear any, because there was nothing to be done on the starboard rigging.

Mr. Andersen: I move that the latter part be stricken as not responsive.

The Court: It may go out.

Mr. Burns: Q. At that time, Mr. Rosen, just before you started the booms the second time, where was Mr. Hansen?

A. He was standing at his place where he should be standing.

The Court: Q. Where was that?

A. By the mast house, between the mast house and the deck cargo.

Q. What was his duty?

A. To slack the starboard guy.

Q. Where were you stationed?

A. I was standing on the No. 1 hatch. [71]

(Testimony of Albert M. Rosen.)

Q. Where, forward? A. Forward, yes.

Q. Forward of Hansen?

A. Forward of Hansen.

Q. And forward of the load? A. Yes.

Mr. Burns: Q. You were facing Hansen?

A. I was facing the gang.

Q. Facing whom?

A. I was facing the whole gang who were working. My job was to watch the operation, and I was facing the winches and the gang.

Q. You were facing the stern of the ship?

A. Yes.

Q. Had you a clear view? A. Yes.

Q. Neither the mast house or mast, nor hatch, nor anything else interrupted your view?

A. No. All of these men were in full view but the two men that were slacking the guy on the forecastle head.

Q. Calling your attention to this diagram, made by Mr. Hansen, will you look at it, please, and see if that is a fairly correct diagram of the forepart of the "Mauna Lei"? A. Well,——

Q. Is it reasonably correct?

A. It is reasonably correct.

Q. Where did you stand?

A. I was standing here on this hatch, right here.

Q. Facing toward the stern?

A. Facing toward here.

Q. Where was Hansen?

(Testimony of Albert M. Rosen.)

A. Hansen was standing right here, right on this corner, here.

Q. Where was Lecht?

A. Lecht was here between these two winches, handling one winch.

Q. Mr. Rosen, what about grease and oil around the deck, there?

A. Well, grease and oil, these winches hadn't been used for, say, six days, and the way the seas came over the ship, washing clean over the ship, it didn't leave much grease or oil, very little. [72]

The Court: Q. I suppose there was some there?

A. Naturally there was some around the winches; there is always some oil around the winches, but not as much as usual at that time, because it was well washed off.

Mr. Burns: Q. Directing your attention to the log entry on January 15, 1941, I will ask you to tell us what the condition of the sea was on the 12:00 to 4:00 watch, and the wind.

A. 12:00 to 4:00 watch, the wind was Force 1, that was just a light breeze, you could hardly see it on the water, a small sea.

Q. That is the entry in the log?

A. That is the entry in the log, by the second mate, who was on watch from 12:00 to 4:00.

Q. That was Mr. Encell? A. Yes.

Q. There is also an entry made in the log concerning Mr. Hansen's accident. Is that entry, signed by A. Rosen, is that your handwriting?

A. That is right.

(Testimony of Albert M. Rosen.)

Q. Will you please read that entry?

A. "At sea. While topping No. 1 booms A. B. Seaman C. Hansen was handling starboard outside guy and tried to pull in the slack"—I don't know whether he was doing that or not—"he got his left hand in the block when the ship took a slight roll"——

Q. You put in the word "slight" there. It says, "when the ship took a roll," not "a slight roll."

A. Yes, "he injured his fingers—middle finger cut off and three other fingers injured. The purser, W. D. Hicks, applied first aid.

Q. Mr. Rosen, just before Mr. Hansen's accident, when the block on the port rigging was being fixed, did you walk over there—after you lowered the port boom down into the boom rest? A. Yes.

Q. Was something done to the snatch block on the port rigging?

A. The block had to be adjusted on the port rigging. [73]

Q. Did you supervise that, or what?

A. I went there and supervised that.

Q. And after that was fixed where did you go?

A. I went back on the load and hollered to the boatswain to heave away, and the boatswain said "All clear" and heaved away.

Q. Before the booms were hoisted again did you give some sort of a command?

A. Well, when I gave the command to "Hoist away", that was a command to go ahead and heave.

Mr. Burns: I think that is all.

(Testimony of Albert M. Rosen.)

Cross-Examination

Mr. Andersen: Could I sak the witness to step down here, your Honor?

The Court: Yes.

Mr. Andersen: Q. Will you step down here? This is the winch, this is the starboard winch?

A. That is right.

Q. And here is your mast house? A. Yes.

Q. Here is your pipe covering, is that about right?

A. That hatch comes out further.

Q. About like that? A. Yes.

Q. Now, as I understand your testimony, Mr. Hansen was standing right here?

A. Right here.

Q. And here is the steam pipe?

A. The steam pipe did not come out there. The mast house comes here, here is the hatch coaming, and here is the steam pipe.

Q. Would you draw in the starboard edge of No. 1 hatch and the starboard edge of the mast house and the steam pipe?

A. All right, I will do that.

Q. We will rub this out so that you can put it in in your own way.

A. That is the hatch coaming, and this, here, is the steam pipe, and here is the mast house, and here is the guard running [74] like that.

Q. Now, as I understand your testimony, Mr. Hansen was standing right there.

(Testimony of Albert M. Rosen.)

A. Mr. Hansen was standing on the mast house, where the guy line was.

Q. All right, put that in. In other words, the place that the guy line was on was right there?

A. Yes.

Q. Was Mr. Hansen standing right there?

A. Standing right by that cleat.

Q. Was he standing on the pipe cover?

A. He was standing between the pipe cover and the mast house.

Q. Was he standing on the pipe cover?

A. Well, he was on the pipe cover, yes.

Q. He was on the pipe cover? A. Yes.

Q. He therefore would be standing right where I have made that "X"?

A. A little over here.

Q. Let us put it the way you say it should be. He was standing at the forward edge of the mast house, I take it, he was standing on this pipe cover?

A. That is right.

Q. Is that where he was standing? A. Yes.

Q. The snatch block was about there, wasn't it?

A. That is right, right in there, in the middle.

Q. I thought I put it in the middle. There is no question about that, that is the snatch block?

A. Yes.

Q. He was standing here. What is the distance from where he was standing to the snatch block?

A. The distance would not be more than two feet or three feet.

(Testimony of Albert M. Rosen.)

Q. Two or three feet. Now, as I understand your testimony, he was standing here at this point which I will mark No. 1, and he had both hands on the line leading to this cleat?

A. Both hands. [75]

Q. Both hands on line running to this cleat?

A. Yes.

Q. He was standing here, and you were standing on hatch No. 1, and you gave the signal to heave away?

A. Did you say he had both hands on the cleat?

Q. I say did he have both hands on the line?

A. I don't know.

Q. In other words, just before this accident, immediately before, you were standing on the No. 1 hatch, about the middle?

A. That is right.

Q. Mr. Hansen was standing here attending to his duties? A. That is right.

Q. He was doing his job?

A. That is right.

Q. He was doing his job just as he should do it?

A. He was where he should be.

Q. He was ready to pay out the line, wasn't he?

A. Yes.

Q. Right where he stood? A. Yes.

Q. You gave the boatswain the signal to heave away? A. That is right.

Q. The boatswain heaved away? A. Yes.

Q. Will you tell me how the accident happened?

(Testimony of Albert M. Rosen.)

A. When we started heaving, Hansen let go of that line, and put his hand on the topping lift.

Q. In any event, you are positive that Mr. Hansen was standing there where I have just drawn on that diagram? A. Yes.

Q. In other words, he was standing at the forward end of this mast house? A. Yes.

Q. He was standing on the pipe cover with either one or both hands on the rope, bent over, because that cleat on the mast house is about 18 inches off the deck? A. Well, more than that.

Q. About two feet off the deck?

A. All right.

Q. So, he was bent over and ready to pay out this line? [76]

A. He did not have to bend over.

Q. He was standing by, then? A. Yes.

Q. Let me show you this exhibit, this is Plaintiff's Exhibit 2. In other words, he was standing a little bit forward of the mast house, wasn't he? This is Plaintiff's Exhibit No. 2, on the front of it there is a little cross, and that cross is alongside a cleat. A. Yes.

Q. That is the cleat from which he was slacking off?

A. That is the cleat from which he was slacking off.

Q. He was standing, according to this, a little bit forward of the mast house?

A. That is right, because that cleat is only six

(Testimony of Albert M. Rosen.)

or seven inches from the edge of the forward edge of the mast house.

Q. He was standing at the forward end of the mast house, wasn't he? He was standing there?

A. Yes.

Q. He was standing there doing just what he was supposed to do? A. Yes.

Q. That is where he was standing when he got hurt?

A. When he got his left hand into the snatch block of the topping lift, yes.

Mr. Andersen: That is all.

The Court: I want to ask you, Mr. Rosen: You said that the boatswain, Mr. Lecht, was your assistant? A. That is right.

Q. Mr. Lecht testified that he asked Hansen to go over to fix something.

A. No, Mr. Hansen never left his position.

Q. You say that Lecht is telling an untruth when he says that? A. He must be mistaken.

Q. You could not be mistaken, could you?

A. No, because I know the port boom had to be lowered, and had to be adjusted. The starboard boom did not need adjustment.

Q. Mr. Lecht said that he told Hansen to take a piece of rope, I [77] don't know what he called it, and go forward and make fast something at the end of the boom on the starboard side. A. No.

Q. That is what Lecht says, that he told Hansen that. A. He is mistaken.

(Testimony of Albert M. Rosen.)

Q. And Hansen says the same thing, Hansen says that he went over and he made this adjustment; Lecht says the same thing. Now you say——

A. I disagree with that.

Q. You say they are lying?

Mr. Burns: Just a minute, I will object to that statement.

The Court: I will withdraw it. I want to get at the truth, here, that is all I want.

Mr. Burns: Might I respectfully direct your Honor's attention to the statement made by Mr. Lecht shortly after this accident happened, and which is diametrically opposed to the testimony he gave in court.

The Court: About what?

Mr. Burns: That Mr. Lecht in court said there was nothing wrong with the port boom, and in his statement which I showed him he said it was the port boom.

The Court: I heard that. Here is one man who is the assistant to Rosen, who testified to one thing which is directly contrary to what Rosen testified to.

Mr. Burns: That is correct, and I submit to your Honor that Mr. Lecht has certainly been impeached by the statement that he made.

The Court: Not necessarily. I heard the testimony.

Mr. Burns: Also Mr. Lecht's testimony that he gave in his deposition is contrary to what he said in court. He said in his deposition that he saw

(Testimony of Albert M. Rosen.)

Hansen come back to the mast house.

The Court: That is not as noticeable as a direct contradic- [78] tion here between this witness and his assistant, Lecht, and the plaintiff in this case.

Mr. Andersen: Could I ask one or two questions?

The Court: Yes.

Mr. Andersen: Q. Mr. Rosen, this operation of making the adjustment at the first stop and before they started again, took but a few minutes; I mean after you started to raise the booms and stopped them because something was the matter, and you fixed it, that just took a few minutes?

A. That is all.

Q. The last question asked you was, when they were fixing this block on the port side you went over and supervised that operation, didn't you?

A. Yes.

Q. You went over there, and you were on the port side; in other words, you were on the other side of the mast house from Mr. Hansen, weren't you? A. That is right.

Q. So you could not look over—— A. No.

Q. You could not look over the mast house and see Mr. Hansen, could you? A. No, I could not.

Q. At that time you could not even see Mr. Lecht, could you?

A. Mr. Lecht I could see.

Q. But you could not see Hansen?

A. No, I could not see Hansen then.

(Testimony of Albert M. Rosen.)

The Court: Q. How do you know what Hansen did if you could not see him at that time?

A. Because Hansen was told to stay where he was, to hold these starboard booms, hold everything, while we are fixing the port boom. The port boom had to be lowered down and adjusted, and he was standing there and hanging onto his rope, or pulling in his slack, or whatever he was doing.

Mr. Burns: I think I can clear that up.

The Court: I wish you would. [79]

Mr. Burns: Q. After the block on the port side was fixed, then what did you do? Did you go back some place?

A. I went on No. 1 hatch and gave orders to heave away.

Q. Before you gave the order to heave away did you see Hansen? A. Yes.

Q. Where was he?

A. He was standing holding that guy attached to that cleat.

Q. In other words, he was standing holding the guy by the mast house, there, is that right?

A. Yes.

Q. On the starboard side? A. Yes.

Q. That is right? A. Yes.

Mr. Burns: I think that is all.

The Court: Q. When you went over to make some adjustment on the port side, could you see Hansen?

A. Well, I turned my back to him then, of course.

(Testimony of Albert M. Rosen.)

who were making the adjustment on the port side, and it [81] might very well be, as you have now admitted, that Hansen could go and make an adjustment on the starboard side while your back was turned. Isn't that so, it might have happened? You say you did not see it, and, of course, in your opinion, it could not have happened without your seeing it, that is your testimony. It might very well be that it could have happened without your seeing it. Proceed.

Mr. Burns: Q. Mr. Rosen, after you adjusted the block on the port side you say you went back to the No. 1 hatch and took up your position?

A. Yes.

Q. And at that time you say that you saw Mr. Hansen? A. Yes.

Q. He was by the mast house?

A. He was by his guy, in his position forward.

Q. Was he on the deck cargo?

A. No, he was standing alongside of the deck cargo.

Mr. Burns: I think that is all.

The Court: Q. How long have you been sailing on the "Mauna Lei"? A. Right now?

Q. Continuously on that boat?

A. Continuously, yes. I have a two weeks' vacation, or three weeks, now.

Mr. Burns: I think that is all.

Mr. Andersen: That is all.

MELY J. GORDENEV,

Called for the Defendant; Sworn.

Mr. Burns: Q. Captain, you are the master of the "Mauna Lei" at the present time? A. Yes.

Q. How long have you been master of that ship?

A. Six years.

Q. How long have you been employed by the Matson Navigation Com- [82] pany?

A. Almost twenty years.

Q. How long have you been going to sea, Captain? A. About 45 years.

Q. You started out as an ordinary seaman, did you? A. I started out as a naval cadet.

Q. You have been on both sailing vessels and steam vessels, is that correct? A. Yes.

Q. How long have you held a license for the deck department? A. From 1923.

Q. Since 1923? A. Yes.

Q. You have sailed on other ships than the "Mauna Lei," have you not? A. Yes.

Q. Directing your attention to January 8, 1941, on the voyage that began on that date, I will ask you, Captain, if you were the master on that date of the "Mauna Lei"? A. Yes, I was master.

Prior to departure did you examine the deck load of the vessel?

A. As far as I remember, we finished loading sometime around 8:30 in the morning, at Pier 30, and it is my duty as master of the ship to walk around to see how the cargo is stowed, so on that

(Testimony of Mely J. Gordenev.)

morning I went around and I saw how the cargo was stowed. It was not quite yet finished, because the men were still working, but they put proper lashings around each load on the deck, and then they put two chains over, and then I think it was about 1:00 o'clock we moved to an anchorage to take on dynamite, and during this time we finished securing it, putting additional wires on, and tightening up the slack in the chains by turn-buckles, so I think about 4:00 o'clock we were absolutely ready to go to sea.

Q. That evening you sailed from San Francisco?

A. That is correct, yes. [83]

Q. And that night, or sometime later, did you run into any particular kind of sea?

A. Yes, I was called about 9:00 o'clock by my officer on watch, who told me the vessel was starting to take seas.

Q. Where, what part of the vessel?

A. On the forward part.

Q. Taking seas over the forward part?

A. Over the forward part.

Q. I might ask you, is that unusual for that time of the year?

A. No, it is a usual occurrence.

Q. For January?

A. Yes. So, I watched the progress of the development, because it started to blow only moderately at first, and we took just spray, and about an hour later, something like that, I saw the water

(Testimony of Mely J. Gordenev.)

coming over more, and it started to blow considerably, so I reduced speed to 50 revolutions and hove the ship to, and by doing so I saw the ship was just about having steerage way, and I waited until the storm passed over, and I think it was something about 6:00 or 7:00 o'clock in the morning when the weather calmed down, and I again put on my full speed.

Q. During the night, did the deckload on the forward part of the ship shift?

A. Yes; it was a very dark night, but we able to see part of the cargo forward through a hole in the top, that there was a little slide to the left, but how much it was we could not see before daylight.

Q. What caused that cargo to shift?

A. I think that was the shipping of the seas and rolling.

Q. Were there seas coming over the forward part of the steel? A. Yes, there was.

Q. The next morning did you examine the deckload? A. Yes.

Q. In the forward part of the deckload what did you find?

A. I examined the forward and aft deckload, and I think I put in the log book the result of my examination. I think it is [84] mostly there.

Q. I will hand you this log book. That would be on January 9th, would it?

A. January 9th, that is right. "Vessel inspected and found (1), forward deckload of steel shifted;

(Testimony of Mely J. Gordenev.)

nothing lost. (2), 17 welded steel pipes of after deckload flattened by sea. (3), Few carboys of acid damaged, contents gone. Inside of the vessel 17 welded steel pipes flattened by cargo stowed on top. Caterpillar tractor loose, damage slight, if any. General cargo in shelter deck shifted and some fell." Signed by M. Gordenev.

Q. Now, Captain, in your experience what would you say as to the condition of the ship after this cargo was shifted?

Mr. Andersen: To which I will object as immaterial, irrelevant, and incompetent.

The Court: Sustained.

Mr. Burns: Q. Did this shifting of the cargo, in your experience, and in your opinion, render the ship unsafe and unseaworthy?

Mr. Andersen: To which I will object as immaterial, irrelevant, and incompetent.

The Court: Sustained.

Mr. Burns: Q. From your experience of 43 years going to sea, Captain, would customary practice require you to turn back to port after the shifting of the deck cargo at that time?

Mr. Andersen: To which I will object as immaterial, irrelevant, and incompetent.

The Court: Overruled.

A. It all depends on what kind of weather we have got. This weather that we had is the usual thing, and if I would turn back in this weather, first

(Testimony of Mely J. Gordenev.)

it was a moderate gale, and two hours [85] later it was a strong gale.

The Court: Q. It was not necessary?

A. It was not necessary.

Mr. Burns: Q. Directing your attention to January 15, 1941, the day Mr. Hansen was injured, you were not present out on the deck at that time?

A. No.

Q. But did you see Mr. Hansen shortly after his accident?

A. I saw him, I think it was, fifteen or twenty minutes past one; I saw him running through the inside passage toward the bridge, and I stopped and asked him what happened, and he said he lost a finger on his hand, and I called the purser and he gave him first aid.

Q. Now, after seeing Mr. Hansen, did you make an examination of the deck? A. Yes, I did.

Q. Did you go out to the forward deck of the ship? A. Yes.

Q. Did Mr. Hansen tell you where he was working?

A. I asked him how it happened, and he said, "No statement."

Q. Did you examine the deck by the mast house on the starboard side? A. Yes.

Q. What was the condition of the deck at that time, in regard to grease or oil?

A. The place around the mast house, between the winch, was dry, there was no oil there, but un-

(Testimony of Mely J. Gordenev.)

derneath it it is protected by a guard about four inches high, and when they make ready to hoist booms they drain it. They have pipes by which the oil goes outside of the ship.

Q. Now, did you examine the deck cargo on the starboard side? A. Yes.

Q. What did you find in regard to the deck cargo? A. After the storm?

Q. No, the day Hansen was injured.

A. I found that these re- [86] inforcing bars, bundles 16 to 20 feet long, were stowed on top of the solid steel, and this steel was falling to the left, shifted a little, and was around the coaming of Hatch No. 1 on the starboard side, it was almost close to the coaming; you could see the wedges, and then between Hatch No. 1 and No. 2 we have got the pipe guard, and this pipe guard was clear.

Q. Those are called steam guards?

A. Steam guards.

Q. You say they were clear?

A. It was clear between Hatch No. 1 and No. 2, and then around Hatch No. 2 this iron, again, was close.

Mr. Burns: There is a diagram prepared by the Captain that is attached to the original deposition.

The Court: We will take a recess for five minutes.

(After recess:)

Mr. Burns: The original diagram is attached to a deposition. May I remove it from the deposition and show it to the witness?

(Testimony of Mely J. Gordenev.)

The Court: Yes.

Mr. Burns: Q. I hand you a rough diagram of the forward part of the S. S. "Mauna Lei," Captain, and ask you if you prepared that diagram? Did you make that? A. Yes, I did.

Q. The diagram shows the deck load on the starboard side, and the winch on the starboard side. Does that show the nature of the deckload on the port side?

A. Yes, because it was the same way on the port side.

Q. So that you have only shown the condition on the starboard side, is that right? A. Yes.

Q. Did you make this after the accident to Mr. Hansen?

A. Yes, I think about an hour and a half after the accident.

Q. Now, I note on the right-hand side of that diagram, on the starboard side of the ship, it has some diagonal lines in red ink, [87] and it says, "Deck load," and some sort of "Line showing the edge of falling structural steel." A. Yes.

Q. What is that—"Curve line"?

A. "Curve line."

Q. And then approximately opposite the mast house there are two lines in red ink with some very fine red ink lines, what is that?

A. That is the edge, from the top down.

Q. I notice opposite and parallel to it is a line, what does that indicate? A. The steam guard.

(Testimony of Mely J. Gordenev.)

Q. It is labeled "Steam pipe or guard," is that correct? A. Yes.

Q. Does that diagram correctly depict the condition of the deck load on the starboard side of the "Mauna Lei" at the time you saw it after Mr. Hansen's accident? A. Yes.

Q. That was a short while afterward, about an hour, is that right? A. Yes.

Q. Now, I note that you also have indicated on that diagram some numbers showing where men were placed, is that correct? A. Yes.

Q. Over on the starboard side, by the toplift, there, is what looks like a "D" and then a "6" and "8". I will ask you what those represent.

A. No. 8 is a sailor.

Q. It is a man standing there?

Mr. Andersen: I am going to object to this as merely hearsay. He was not there when it happened.

The Court: Q. You were not there when it happened? A. No.

Q. You placed a man there because somebody told you?

A. No, it is in the line of my duty.

Q. Were you there?

Mr. Burns: No, he was not there.

The Court: The men should be there, that is what you know? A. Yes, that is correct.

Mr. Burns: I will offer it, your Honor, in evidence. [88]

(Testimony of Mely J. Gordenev.)

(The diagram was marked "Defendant's Exhibit "B.")

The Court: Q. This irregular line is where the deck cargo shifted? A. Yes.

Q. That cargo was in a loose condition, then, was it not?

A. I could not say it was in a loose condition.

Q. It shifted, and some of this dropped over the side alongside the No. 2 hatch, and very close to Hatch No. 1?

A. We have got turnbuckles on the chains and we take all the slack in before we start to sea, and as soon as the ship starts to rolling these lines always get a little bit of slack in them, and we always twice a day look at the turnbuckles and take in any slack there is. This happened about two hours or three hours after we had left.

Q. I understood about 9:00 o'clock.

A. I believe that you are right.

Q. What is this "G" here?

A. It is the name for this rope.

Q. Is this the outside guy line, here?

A. Yes.

Q. And is this the inside guy line?

A. It is the inside guy line.

Q. This is the starboard boom? A. Yes.

Q. And Hansen was working in here some place?

A. He was over this way.

Q. He was handling what line, the inside line?

(Testimony of Mely J. Gordenev.)

A. Yes, the inside guy line.

Mr. Burns: Q. After the deckload shifted, that is, January 8th or 9th, when you left San Francisco, and directing your attention to the next day, was there anything done about tightening those turnbuckles?

A. They were tight like a spring, it was absolutely impossible to take in any slack.

Q. About how often are these turnbuckles tested?

A. They are ex- [89] amined every morning and every night.

Q. What is the purpose of that examination?

A. Usually to see if there is any slack in the deckload.

Q. If there is any slack the turnbuckles are tightened?

A. The turnbuckles are tightened.

Q. I will ask you—this deckload was not shored, was it? A. No.

Q. Will you please tell the Court, Captain, why the deckload was not shored, and if you would like to illustrate on the board you may.

A. The "Mauna Lei" is a type of vessel called flush deck. The Shipping Board vessels have a raised forecastle head, like that, and they have got bulwarks in here.

Q. How high is that bulwark?

A. About four feet.

Q. That is on Shipping Board vessels?

A. On Shipping Board vessels.

(Testimony of Mely J. Gordenev.)

Q. But not on the "Mauna Lei"?

A. On the "Mauna Lei" we have a flush deck, she was built as a passenger vessel before, and she has different lines. Her bow is not fashioned like this—it is like that.

Q. That is a sort of cross section looking at the bow?

A. Yes. We have only got a 59-foot beam, this part of the ships is 59 feet, and running from Hatch No. 2 forward from here to here it starts to sheer, and this part is very narrow.

Q. That is at No. 1 hatch?

A. At No. 1 hatch, which would make it about 35 feet.

Q. That is the deck of the vessel at the No. 1 hatch?

A. No. 1 hatch, and this is not straight, here, there is an angle to the deck, and sloping toward the bow, she is 90 degrees here, and then it starts to fall down, and the size of these plates is about six inches, and here is a water way about two inches deep, and about ten inches wide, so we must put it six [90] inches inside; here is the part of the deck load in here, and if we put shoring in here and lash it together then it will chafe. Now, if you had a bulwark and stanchions this close it will stay solid, but we could not do it on our ship on account of the manner she is built. We figured from experience in flush deck ships if we have a deckload, we take a cross section, and we make it fast here, take it around and

(Testimony of Mely J. Gordenev.)

make it fast again here, it makes it solid. I think that is the reason why I did not insist on shoring, because it is not practical.

Mr. Burns: You may cross-examine.

Cross-Examination

Mr. Andersen: Q. That is the quickest way of doing it, is it not? A. You mean quickest?

Q. Yes.

The Court: You mean the last illustration?

Mr. Andersen: The last illustration.

A. It is quick and safe.

Q. I say, it is much quicker than shoring, isn't it?

A. I don't know.

The Court: Q. I suppose you could fasten a deckload more quickly that way than you could by shoring? A. That is true.

Mr. Andersen: Much quicker.

Q. Will you come down, and using the same board—we will rub this out.

Mr. Burns: Just a moment.

Mr. Andersen: Did you want that?

Mr. Burns: Yes.

Mr. Andersen: I am sorry.

Q. Will you explain why you could not shore it?

A. Here is the [91] hatch.

Q. And it had about a 20-inch coaming?

A. Yes. Our hatch coaming is about two and a half feet. We have got a fish plate. Under this we have got iron reinforcement, and here is a steam

(Testimony of Mely J. Gordenev.)

pipe, so if I wanted to shore it I must put the shoring right over here and then put some here.

Q. Are you through now for a moment?

A. Yes.

Q. That is called a bracket, is it not?

A. Yes.

Q. That bracket is about four or six feet fore-and-aft along the hatch?

A. Just about four feet.

Q. In other words, those brackets are about four feet apart as you go along the hatch?

A. Yes.

Q. So it would be very easy to put shoring in between, I mean they would not prevent you from shoring? A. You could do it.

Q. Wouldn't it be very simple on the inboard side to take a piece of wood, say 6 by 6, as you have shown there, and put shoring out here, and also out in here?

A. It could be done, but it is not necessary.

Q. It is not necessary? A. No.

Q. You stated, Captain, with respect to this heavy weather that you had that you expected that kind of weather at this time of the year.

A. Yes.

Q. So that you knew when you were going out that you were going to get heavy weather?

A. Not exactly knew it, but you expect it.

Q. After this steel collapsed, or fell over, it fell in a sort of half a dozen different ways, didn't it?

(Testimony of Mely J. Gordenev.)

Mr. Burns: I object to the use of the word "collapsed."

Mr. Andersen: I will use the word "shifted."

Q. After this steel shifted it fell in half a dozen different ways, didn't it?

A. I don't know whether it fell half a [92] dozen different ways.

Q. It was very difficult to walk over the top of it, wasn't it?

A. Well, around Hatch No. 2, yes.

Q. And around Hatch No. 1?

A. I couldn't tell you, but I don't think so.

Q. You don't think so? A. No.

Q. I will direct your attention to page 16 of your deposition, at line 23. Will you read from line 23 or 24 on page 16, to about line 8 on page 17?

Mr. Burns: I will object to the question as immaterial, whether it is difficult to walk around hatches, or not. It has nothing to do with this question.

The Court: Overruled.

Mr. Andersen: Q. Would you read it to yourself, Captain? A. Yes, I have.

Q. Those questions were asked of you and those answers were given by you, weren't they?

A. Yes, but I did not answer in half a dozen ways.

Q. May I read this into the record before you explain it:

(Testimony of Mely J. Gordenev.)

"Q. And the steel was piled up there like it shows in the pictures which you have seen?

"A. Yes.

"Q. And then after it was piled it shifted and fell in half a dozen different ways, so that it would be very difficult to walk on this steel, wouldn't it?

"A. Well, if you tried to go on top of the steel, yes.

"Q. Certainly, of course. And when you were going to start this operation of topping these booms, in order to hang the blocks on the shrouding they, of course, had to walk back and forth across the steel, didn't they?

"A. Yes, they must go across the steel." [93]

A. Might I ask a question?

The Court: You answer the question and if you want to explain your answer you may.

A. I want to explain, your Honor, when this picture which was shown to me was taken at Honolulu part of the cargo was discharged, and it was entirely different than it was before.

Q. You say now that the testimony you gave in your deposition refers particularly to the condition as shown in the picture? A. Yes.

Mr. Andersen: Q. Captain, when these pictures were taken part of the steel had already been removed, hadn't it?

A. That is what I pointed out.

Q. So that before this steel was removed the steel

(Testimony of Mely J. Gordenev.)

was in greater disarray than it is here when the picture was taken, was it not?

A. I just tried to say that the top layer was not in such a condition as when you took the picture.

Q. That is, before the picture was taken after Mr. Andersen was injured, the steel at that time——

A. (Interrupting) The picture was taken afterward.

Q. The picture was taken two or three days after he was injured, but on the 15th of January, when Hansen was injured, it was difficult to walk over the steel, then, was it not?

A. Just on the edge, close to the hatch, but on top you could walk.

Q. I mean it was rough, and there were edges that you had to step on? A. Like that.

Q. You could not walk over it with too great a degree of safety, could you? A. No.

Q. I mean, it was not as safe as walking on the deck, for instance? A. Well, I don't know.

Q. You don't know? A. No. [94]

Mr. Andersen: That is all.

Mr. Burns: I have one other matter, and that is the deposition of Mr. Encell, the second mate. Do you want me to proceed and read that?

The Court: Yes, if you wish.

Mr. Burns: This is the deposition of Charles Wood Encell taken on March 9, 1942.

Mr. Andersen: I was going to suggest we could

(Testimony of Mely J. Gordenev.)

offer it in evidence and maybe the court could read it more quickly.

The Court: If it is agreeable you may offer it in evidence and let it be deemed read and call attention to such parts as you think you would like to have me hear. Is it necessary to read all of it?

Mr. Andersen: In my opinion it is simply cumulative.

Mr. Burns: I do not like to take the time of the Court to read it.

The Court: If you wish you may.

Mr. Burns: I would prefer to.

The Court: Go ahead.

(Mr. Burns thereupon read the direct examination of Charles Wood Encell from his deposition, on file herein, taken at San Francisco, California, on March 9, 1942, before Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, State of California.)

Mr. Andersen: I am perfectly willing to permit the Court to read the cross-examination, rather than read it at this time.

The Court: If you do not wish it read, you need not, I will not insist upon it. The balance of the deposition may be deemed to have been read. [95]

DEPOSITION OF CHARLES WOOD ENCELL

Be it remembered, that on Monday, the 9th day of March, 1942, at 8:30 o'clock P. M., pursuant to oral stipulation between counsel for the respective parties, at the office of Messrs. Brobeck, Phleger & Harrison, Room 1100, 111 Sutter Street, San Francisco, California, personally appeared before me, Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, State of California,

CHARLES WOOD ENCELL,

a witness called on behalf of the defendant in the above-entitled action.

Messrs. Andersen & Resner, represented by George R. Andersen, Esquire, appeared as attorneys for the plaintiff; and Messrs. Brobeck, Phleger & Harrison, represented by Robert Edward Burns, Esquire, appeared as attorneys for the defendant.

The said witness having been by me first duly cautioned and [96] sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be recorded stenographically by Frank L. Hart, a competent official shorthand reporter and

(Deposition of Charles Wood Encell.)

a disinterested person, and thereafter transcribed by him into longhand typewriting, and by stipulation between counsel for the respective parties, the reading of the testimony by the witness and the signing thereof were waived.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel, in the absence of the Notary Public, it shall be deemed that the Notary Public has so instructed the witness to answer, but that he still refuses to answer.

Mr. Burns: Will you stipulate that the Notary may be excused?

Mr. Andersen: Yes. [97]

Mr. Burns: And will you also stipulate that if the witness refuses to answer any questions it will be deemed he has been instructed by the Notary to answer?

Mr. Andersen: I will insist upon that. The usual applicable stipulations.

Mr. Burns: And will you also stipulate that the reading, correcting and signing of the deposition by Mr. Encell is waived?

Mr. Andersen: Yes.

Mr. Burns: Will you also stipulate that all ob-

(Deposition of Charles Wood Encell.)

jections are saved and reserved until the time of trial, except objections to the form of the questions?

Mr. Andersen: Will you repeat that?

(Record read.)

Mr. Andersen: Well, I would insist upon that. This is your witness.

Mr. Burns: That is right.

Mr. Andersen: Yes. [98]

CHARLES WOOD ENCELL,

a witness called on behalf of the defendant, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

Mr. Burns: Q. What is your full name?

A. Charles Wood Encell.

Q. What is your occupation, Mr. Encell?

A. I am chief officer on the S. S. "Permanente".

Q. And where do you reside? Where is your home? A. 2226 Stuart Street, Berkeley.

Q. Mr. Encell, you are leaving for sea shortly, are you not? A. Yes.

Q. Do you know whether or not on April 21st, 1942, you will be in California?

A. I do not expect to be, but our sailings and arrivals remain a secret.

Q. How long have you been going to sea, Mr. Encell?

A. Approximately thirteen years altogether.

(Deposition of Charles Wood Encell.)

Q. Do you hold a master's license?

A. Yes.

Q. How many years have you held a license in the deck department? A. Since 1932.

Q. Did you serve as second officer on the S. S. "Maunalei"? A. Yes, sir.

Q. How long did you serve as second officer on that vessel? A. Approximately two years.

Q. Were you serving on that vessel during 1941?

[99]

A. I was until March 15th, 1941.

Q. Now, directing your attention to January 15th, 1941, you were employed as second mate on the "Maunalei" on that date? A. Yes, sir.

Q. What watches did you stand on that date?

A. The 12:00 to 4:00 watch.

Q. The 12:00 to 4:00 watch. And directing your attention to the 12:00 noon to 4:00 P. M. watch, were you on duty during that time? A. I was.

Q. Where were you standing your duty on the ship? A. On the bridge.

Q. At that time and on that date, that is, January 15th, 1941, where was the vessel, approximately?

A. She was arriving in Honolulu the next morning.

Q. On that watch was anything done to the rigging on the forward deck?

A. Yes, the booms were topped.

Q. They were what?

A. The booms were topped; they were hoisted up for discharging cargo the next day in Honolulu.

(Deposition of Charles Wood Encell.)

Q. Was that customary to top the booms the day before you arrive in port?

A. It is, the weather permitting.

Q. Now, at that time, that is, from 12:00 to 4:00 on January 15th, 1941, what were the weather conditions?

A. It was almost calm with light airs and smooth sea.

Q. To the best of your recollection about what time did they start lifting the booms?

A. They started at 1:00 o'clock in the afternoon.

[100]

Q. And how many watches were out there on the deck?

A. There were three watches with the boatswain, all except one man on the 12:00 to 4:00 watch, and he was at the wheel steering.

Q. In other words, the entire watch was out there with the exception of the one man at the wheel?

A. Also the chief mate, who was directing.

Q. What was the chief mate's name?

A. Albert Rosen.

Q. Did he direct the operations personally?

A. He did personally.

Q. At the time they started that work did you notice Mr. Charles Hansen, the plaintiff in this case?

A. I noticed them all. I watched the operation from the bridge.

Q. Was he on deck at that time?

A. He was on deck. He was standing at the star-

(Deposition of Charles Wood Encell.)

board side of the mast-house forward.

Q. And you knew Mr. Hansen as one of the crew, did you? A. I did.

Q. He had been on the ship for some time, had he?

A. I don't know exactly how long, but he had been on the ship for some time.

Q. Had he ever worked in any of your gangs——

A. Yes.

Q. Or gangs that you had directed?

A. Yes, he was assigned to my gang on the after end of the [101] ship for the mooring and unmooring of the ship.

Q. At this time, that is, around 1:00 o'clock on January 15th, you say Mr. Hansen was on the starboard side of the mast-house? A. He was.

Q. That is, just prior to the beginning of these operations—— A. Yes.

Q. Of raising the booms? A. Yes.

Q. Was there anything outboard from Mr. Hansen? A. Yes, there was deck cargo.

Q. What was the deck cargo?

A. It was steel.

Q. Steel beams?

A. Steel beams and bundles of reinforcing steel, I believe, and if I remember correctly.

Q. How much space would you say there was between the mast-house and the deck cargo at that time?

A. I should say three or four feet, approximately.

(Deposition of Charles Wood Encell.)

Q. From your experience, and in working at sea, was that a sufficient and proper space?

Mr. Andersen: Just a moment. I will object to that question as leading, suggestive, and calling for the conclusion and opinion of the witness.

Mr. Burns: All right.

Q. Have you ever worked on topping booms—that is, lifting booms on ships of this type?

A. Yes.

Q. Are you familiar with the operations of topping booms on this particular ship?

A. Yes. [102]

Q. Directing your attention to the space that Mr. Hansen was standing in, what would you say with regard to the amount of space that was there so far as the work that he was assigned to do——

Mr. Andersen: Just a moment. I object——

Mr. Burns: Let me finish the question, and then you can make your objection.

Q. (Continuing): Was it sufficient or insufficient?

Mr. Andersen: The same objection to that question.

Mr. Burns: You may answer.

A. I shall answer?

Mr. Burns: Yes.

A. I should say he had ample space.

Q. Will you describe just what you heard, and what was done at the time the booms were raised on this day?

(Deposition of Charles Wood Encell.)

A. Well, owing to the height of the deck load they had to lead the topping lift across the deck to the snatch block on the mast-house, and then to the niggerhead on the winch; the deck load was so high that another snatch block had to be placed on the shroud to hold the topping lift clear of the deck load.

Q. Which side was this on?

A. Both sides.

Q. Both sides? A. Yes.

Q. Both the port and the starboard sides?

A. Yes.

Q. Then how did that affect the operations of raising the booms?

A. Well, it didn't affect the operations of [103] lifting the booms or raising the booms, except it just cleared the topping lift line so that it wouldn't chafe and cut into the deck load, and when they started to heave up the booms, and got them about ten feet off the deck, the mate noticed that on the port side——

Mr. Andersen: Just a moment. I will move that be stricken as hearsay.

Mr. Burns: I will ask the questions directly.

Q. You say Mr. Rosen was directing the operations? A. He was.

Q. About where was he standing?

A. He was standing on No. 1 hatch, and out on the deck load from time to time; in that vicinity.

Q. And was he facing aft or forward?

A. Just when do you mean?

(Deposition of Charles Wood Encell.)

Q. Well, about the time they started raising the booms where was he facing when you noticed him?

A. Well, he looked all over—all over the operations.

Q. Now, the booms that were raised were the No. 1 booms, is that correct? A. That is right.

Q. And there were two of them?

A. There were two of them.

Q. And they are the booms that serve the No. 1 hatch, is that correct? A. That is correct.

Q. And there is one on the port side, and one on the starboard side? A. Yes. **[104]**

Q. On each side of the No. 1 hatch?

A. Yes.

Q. Before they are raised they lay prone on the deck in a cradle, is that correct—each having its own cradle?

A. Yes, each has its own cradle about six feet off the deck.

Q. The cradle is up toward the front of the ship on each side? A. Yes.

Q. And the boom is laid in that cradle?

A. That is right.

Q. Was there an order given to raise these booms? A. Yes.

Q. Who gave the order? A. Mr. Rosen.

Q. And what if anything did he say, do you remember? A. He said, "Heave away."

Q. And in sailors' language that means to raise the booms, is that correct?

(Deposition of Charles Wood Encell.)

A. That is right.

Q. And the booms are raised by winches, is that correct? A. Steam winches.

Q. Steam winches? A. Yes, sir.

Q. And there is a steam winch for each boom, is there? A. Yes.

Q. And each steam winch is aft of the No. 1 hatch and right next to the No. 1 hatch, is that correct?

A. They are.

Q. Who was handling the winches?

A. The boatswain.

Q. Could he operate both at the same time?

A. Yes, he could. [105]

Q. Where would he stand?

A. He would stand between the winches, at the forward edge of them, and levers came out from each winch so that he could hold one in each hand.

Q. He would hold a lever to each winch in each hand? A. Yes.

Q. The boatswain was facing forward?

A. He was facing forward.

Q. Now, after Mr. Rosen said, "Heave away," what happened? Did the booms start going up?

A. They started going up, and they went up about ten feet, and Mr. Rosen said, "Hold everything", and the port topping lift——

Q. I know, but when he said "Hold everything", what happened?

A. The boatswain stopped the winches.

(Deposition of Charles Wood Encell.)

Q. And what if anything had happened that you saw?

A. The snatch block on the port shroud holding the topping lift off of the deck load was not high enough on the shroud, and he stopped and lowered the port boom down into the cradle again to shift the snatch block up higher so that it would serve its purpose.

Q. And all of that time the starboard No. 1 boom was still ten feet off the deck, is that correct?

A. Yes.

Q. After the snatch block for the port boom had been changed, what happened then?

A. Mr. Rosen gave the order to heave away.[106]

Q. And after he gave the order to heave away did you hear anything else?

A. Yes, I saw the boatswain look around at all the men he had stationed around there, and he said, "Everybody stand clear."

Q. And then after the boatswain said that what happened?

A. He started heaving away again.

Q. By that you mean the boatswain started the winches? A. Yes.

Q. And what happened after that, if anything?

A. Well, this Hansen said "Ouch", and the boatswain stopped the winches, and Hansen pulled his hand out of the snatch block that the topping lift was led through to the gypsy-head on the starboard boom.

(Deposition of Charles Wood Encell.)

Q. How soon after the winches had started did Mr. Hansen say "Ouch", if you remember?

A. Immediately.

Q. Had the booms moved?

A. They had moved, but not much; they had just started to move.

Q. You say when you heard him shout "Ouch", you looked down at him, is that correct?

A. That is right.

Q. And you could see him there?

A. I saw him plainly.

Q. You say you saw him pull his left hand out of the snatch block? A. I did.

Q. And that snatch block was on what? Will you describe that again?

A. It was on the mast-house, and [107] it was hooked into a pad-eye.

Q. And a pad-eye is an eye in the mast-house?

A. That is right.

Q. And the block is hooked into it?

A. That is right.

Q. And what else was this particular block used for, or what was it used for?

A. The topping lift was led through that block from the outboard—from the rigging of the outboard rail to make it lead straight to the gypsy-head to heave the boom up.

Q. To heave which boom up?

A. The starboard No. 1 boom.

(Deposition of Charles Wood Encell.)

Q. Did this block have anything to do with the block that had been changed a few minutes before?

A. No, that one that was changed a few minutes before was on the port side of the ship.

Q. The port side of the ship? A. Yes.

Q. Now, this particular block you say had a line running through it? A. Yes.

Q. And what do you call that line?

A. The topping lift.

Q. And the topping lift runs from the winch through the block and then over to the rail, is that correct?

A. I would say it runs from the rail over to the snatch block and then to the winch.

Q. And where does it lead from to the rail—from the boom? A. From up on the mast.

Q. From up on the mast? A. Yes. [108]

Mr. Andersen: This is off the record.

(Off the record.)

Mr. Burns: Q. At the time Mr. Hansen drew his hand away, did you notice whether or not he was wearing anything on his hand?

A. He was wearing gloves.

Q. He was wearing gloves? A. Yes.

Q. After that what did Mr. Hansen do, if anything, which you saw?

A. He came running up to the bridge to me, and he said, "I have hurt myself," and he was gripping his left hand with his right.

(Deposition of Charles Wood Encell.)

Q. And what did you do then?

A. I called the purser, who acted as first aid officer on the ship.

Q. There was no regular doctor on the ship?

A. There was no regular doctor.

Q. And the purser acts? A. Yes.

Q. And the purser gave him first aid treatment, is that correct? A. He did.

Q. Well, now, Mr. Encell, before the No. 1 booms were first lifted out of the cradle, did you notice what Hansen was doing, or did you notice him particularly?

A. He was holding onto the starboard port guy. He was placed there to slack that off as the boom came up.

Q. That was not the rope that passed through the snatch block? A. That was not, no.

Q. What did that guy lead to that he was holding?

A. It led to the head of No. 1 starboard boom.

[109]

Q. Was there anything in between that—was it attached to an object on the mast-head?

A. Yes, it led from the head of the boom down to a cleat on the mast-house on the starboard side.

Q. A cleat? A. Yes.

Q. And his duty was to slack the rope through that cleat?

A. Yes, as the boom was hoisted up.

Q. As the boom was hoisted up? A. Yes.

Mr. Burns: That is all.

(Deposition of Charles Wood Encell.)

Cross-Examination.

Mr. Andersen: Q. You do not know how long Hansen had been on the ship, do you?

A. I do not remember exactly.

Q. Do you remember approximately how long it was? A. I couldn't answer that.

Q. Well, was it two or three or four or five voyages?

A. I should imagine so, but the men come and go so frequently that I don't know how long it was.

Q. How long had he worked under your direct supervision, if at all?

A. As long as he had been on the ship.

Q. His services were always satisfactory, then, I assume? A. He was rather awkward.

Q. He was rather awkward?

A. He was rather awkward. He tended to day dreams at times instead of minding his work.

Q. Did he always do the work that you told him to do? [110] A. He was always——

Mr. Andersen: Just answer the question "Yes" or "No", please.

Q. Did he always do the work you told him to do?

A. Sometimes he didn't do it very satisfactorily.

Q. Did he ever sign off the boat?

A. What is that?

Q. Did he ever sign off the boat?

A. Did he ever sign off?

Q. When he quit the boat, for instance, did he sign off?

(Deposition of Charles Wood Encell.)

A. I didn't take care of the Articles.

Q. Did you ever log him for anything?

A. No.

Q. You never had occasion to log him, did you?

A. It wouldn't be my duty to log him if I had an occasion.

Q. Did you ever report him for logging?

A. No.

Q. Did you ever criticize his work to him?

A. Yes.

Q. When? A. On numerous occasions.

Q. Well, name a few of them?

A. The dates, do you mean?

Q. Yes, anything that will refresh your memory.

A. I don't remember dates.

Q. State anything that will refresh your memory about it. In other words, what I want to know is what acts he committed that were not acts of proper seamanship.

A. Do I have to answer that? [111]

Mr. Andersen: Yes, of course you do.

Mr. Burns: If you remember.

A. Well, he was just awkward and slow in mooring the ship, and in handling the mooring lines; that was where he worked for me.

Mr. Andersen: Yes.

A. And I do not remember any specific times when that was.

Q. For how long did he act under your direct supervision in mooring the ship—was it all of the time he was on the vessel?

(Deposition of Charles Wood Encell.)

A. All of the time he was on the vessel—whenever we moored the ship.

Q. In other words, you are trying to tell me that so far as mooring the ship was concerned, that his seamanship was not satisfactory, is that correct?

A. It was not the best.

Q. Was it satisfactory? A. Well——

Mr. Andersen: Just answer "Yes" or "No," if you will.

Mr. Burns: You can explain your answer.

Mr. Andersen: You can answer "Yes" or "No", and then explain your answer if you wish.

Mr. Burns: If it is not possible to give a direct answer.

A. It is not possible to give a direct answer because he was certificated as an able seaman by the Department of Commerce, and it is not possible to fire a man except for a few specific things. The Union doesn't allow it. If a man just isn't the best workman that doesn't constitute a reason for discharging [112] him.

Mr. Andersen: Q. But after each voyage you can simply refuse to sign him on, can't you?

A. If he fails to show up for duty, or show up on duty drunk.

Q. Let me put it this way: Supposing "A" signs on your ship for a trip to Honolulu and return, and the voyage is made, and he returns back to San Francisco—he was signed on that way,—and you do not like the color of his hair, you can refuse to re-sign him, can't you?

(Deposition of Charles Wood Encell.)

A. I haven't anything to do with that. It is up to the chief officer.

Mr. Burns: I do not think that is true. If "A" is sent from the union hiring hall it is up to the company to take him unless there is something—I think it is necessary for the company to take him unless he was guilty of a dereliction of duty.

Mr. Andersen: Q. Have you ever read the contract, if there is such a contract, between the Sailors' Union of the Pacific and the Matson Navigation Company?

A. I have read it now, but it was changed since then.

Q. I don't know. I never read it myself. Did you read it in January, 1941? A. No.

Q. Or January, of 1940? A. No.

Q. You are generally familiar with maritime practices, aren't you? A. Yes.

Q. And you were second in command of the vessel, weren't you? [113]

A. No, I was third. The chief officer was second in command.

Q. You are chief officer on the "Permanente"?

A. Yes, and I was second mate on the "Maunalei".

Q. You were second mate? A. Yes.

Q. Hansen worked under your direct command, didn't he? A. Yes, he did sometimes.

Q. And you were an officer on the vessel?

A. Yes.

(Deposition of Charles Wood Encell.)

Q. And you never put in a request that he be not signed on for a succeeding voyage, did you?

A. No.

Q. You never did? A. No.

Q. Now, to get back to this question that I asked you before, namely, what specific acts he did that in your opinion made him an incapable seaman, if any?

A. Well, for one thing he almost invariably put the stoppers on the mooring line wrong, backwards, or some other way, and I had to correct him continuously.

Q. You had to correct him? A. Yes.

Q. How long did he attend to this mooring for you—on every trip that you were on?

A. No, I was on there for two years, and he wasn't there that long.

Q. As long as he was on the vessel he was assigned to you, was he? A. Yes.

Q. And how many other A.B.s and ordinary seamen were on the vessel besides Hansen?

A. Five A.B.s. [114]

Q. Five A.B.s.

A. And three ordinary seamen.

Q. And three ordinary seamen? A. Yes.

Q. Did you ever replace him with another man?

A. No, because I needed all the men I had.

Q. I say did you ever replace him with another man? A. Did I ever replace him?

Q. Yes. A. No, I did not.

Q. In other words, take another A.B. or an ordinary seaman from another task on the vessel and

(Deposition of Charles Wood Encell.)

have him replace Hansen for the purpose of mooring?

A. At the particular time they are mooring they are all busy.

Q. I say did you ever sign any other A.B. or ordinary seaman to Hansen's task and shift Hansen to some other task than mooring?

A. They are all mooring, except the man at the wheel, when they go alongside of the dock.

Q. You never had him do anything except mooring, is that correct? A. That is correct.

Q. All right. Now, of course, I assume that at the time of this accident he was not working under your direct command? A. He was not, no.

Q. Somebody else was in command of the deck at that time, is that correct?

A. That is right.

Q. And you were on the bridge?

A. I was on the bridge.

Q. And you were approaching Honolulu?

A. We were arriving in Honolulu the next morning. [115]

Q. Yes. You were a night away, we will say, or twelve hours away from Honolulu, is that correct—twelve or twenty-four hours away, is that correct?

A. Within twenty-four hours.

Q. Within twenty-four hours? A. Yes.

Q. I understood you to say that you were topping these booms before you were at the port—before you were at the dock you were topping them?

(Deposition of Charles Wood Encell.)

A. Yes.

Q. You were topping them twenty-four hours away, is that correct?

A. Less than twenty-four hours away.

Q. And you say that is compatible with the practices aboard the ship?

A. Yes, I say it is.

Q. And compatible with practices aboard that ship?

A. All ships that I have ever been on.

Q. You always do that? A. Yes.

Q. And that is the usual practice, is it?

A. Yes, it is.

Q. Now, you stated the weather was quite fair?

A. I did.

Q. Leaving San Francisco you had some bad weather, didn't you?

A. We had some bad weather, yes.

Q. And you had quite a bit of bad weather, didn't you, that lasted for several days?

A. I imagine it lasted a couple of days. I don't remember exactly how long it lasted.

Q. And then it calmed? A. Yes, it did.

Q. And what is the trip from here to Honolulu —how many days? [116]

A. It is approximately seven days on that ship.

Q. So you had about two days bad weather, and the rest was good weather?

A. The rest wasn't so bad, and then we got good weather in the lower latitudes.

(Deposition of Charles Wood Encell.)

Q. You got good weather for the last two or three days?

A. I don't remember exactly how many days, but we had good weather toward the last part of the trip.

Q. According to the best of your recollection you had two or three days of good weather?

A. Yes.

Q. And the first two were bad, and the others not so bad? A. I think that is correct.

Q. That is substantially correct?

A. Yes, that is the way I would remember it.

Q. Do you remember anything about any wires being sent by the master or the chief officer to Honolulu or to San Francisco regarding a shifting of the deck load?

A. I do not know because that was outside my duty.

Q. You have no knowledge of that, have you?

A. No.

Q. You know the deck load shifted, don't you?

A. I know it shifted.

Q. And that deck load was what?

A. Part of it in this particular location was long steel beams.

Q. Long steel beams? A. Yes.

Q. How long were they?

A. I don't remember exactly.

Q. Approximately how long were they? [117]

(Deposition of Charles Wood Encell.)

A. Well, I don't remember whether they were 40 or 60 foot beams.

Q. And what did you have beside the steel beams in that immediate locality?

A. Well, I don't remember the contents of all the deck loads we carried. We have different commodities on different trips.

Q. Now, as I understand it, you say that there was plenty of room for a man to work where Hansen was working on the vessel. A. Yes.

Q. And about how many feet did you say?

A. I should say approximately three or four feet.

Q. Three or four feet? A. Yes.

Q. From the deck load to where?

A. Between the mast-house and the deck load.

Q. And that deck load extended all along the ship, didn't it? A. Practically.

Q. Was there any walk-way or anything there?

A. Yes, there was a walk-way left on the steam pipe guard.

Q. Was there any other walk-way besides that?

A. I do not remember for sure whether there was, or not.

Q. The mast-house that you mentioned, is that fore or aft? A. It is forward.

Q. It is forward? A. Yes.

Q. So everything you are talking about happened forward, didn't it? A. Yes.

Q. So on the starboard side of the ship there

(Deposition of Charles Wood Encell.)

when a man [118] walked fore and aft, what did he walk on? He had to climb over the load, didn't he?

A. After the load shifted perhaps he may have; I don't remember.

Q. At the time of this accident you say there were three or four feet from the mast-house to the first steel beams, is that correct?

A. Approximately, I should think.

Q. Yes. Now, before the load shifted how much space was there in there?

A. Well, there wasn't any more space than there was afterwards. There would have been additional space up on the top of the steam pipe guard.

Q. Additional space?

A. Of course, he wouldn't stand up there. He couldn't to do the work anyway.

Q. I see. But the point is that there wasn't much free room in this general locality, was there?

A. I should say there was ample room.

Q. You mean at the particular space where he was working and doing what he was told to do so far as you know? A. Yes.

Q. As long as he stood right there there was ample room, wasn't there?

A. Yes, for his duties.

Q. Do you know what caused the load to shift?

A. Heavy weather.

Q. Heavy weather?

A. And heavy seas coming over the deck.

(Deposition of Charles Wood Encell.)

Q. They came over the side?

A. Over the deck. [119]

Q. Over the deck? A. Yes.

Q. And now after the load shifted was it re-shored?

A. It wasn't possible to re-stow it.

Q. I said was it re-shored, or was it shored?

A. It was lashed and the lashings were re-tightened.

Q. That is, they were lashed with what?

A. With chain lashings.

Q. With chain lashings?

A. Yes, and turnbuckles.

Q. So as to be held as firmly as it could?

A. Yes.

Q. But they weren't re-stowed, were they?

A. The material was too heavy. It couldn't be at sea.

Q. In other words, it had to remain as it was?

A. Yes.

Mr. Burns: By "re-stowing", do you mean re-piling?

Mr. Anderson: Re-piling, yes.

Q. And furthermore in that rough sea do you say you couldn't have re-stacked it or re-piled it?

A. On the after deck we re-lashed it.

Q. You couldn't re-pile these steel beams in that heavy weather, could you?

A. You couldn't in any weather; it was too heavy.

(Deposition of Charles Wood Encell.)

Q. That is right. Hansen was working then on the starboard side of the ship, wasn't he?

A. Yes.

Q. (Continuing:) At this time and place in question? A. Yes.

Q. I will show you a photograph—— [120]

Mr. Burns: Let me see it.

(Photograph handed to Mr. Burns.)

Mr. Andersen: Q. Do you recognize this photograph, or, rather, what is depicted in that photograph?

(Photograph handed to the witness.)

A. That could be a photograph of the "Maunalei" at that time, or could be some other ship; I don't know.

Q. Do you recognize anything there on that photograph?

Mr. Burns: I submit he has answered the question.

Mr. Andersen: Q. Do you notice a pad-block there?

Mr. Burns: A pad what?

Mr. Andersen: Q. A pad-block or pad-ring, rather? A. Yes.

Q. Is that the pad-ring that you described before?

A. It may or may not be. I can't tell whether it is, or not.

Q. Do you notice a block in that picture?

A. I notice a lead block and a snatch block.

(Deposition of Charles Wood Encell.)

Q. And have you seen that snatch block before, could you tell?

A. I have seen hundreds of them like it. I don't know whether I have seen this before or not.

Q. Taking a general look at it——

Mr. Burns: He said he has seen hundreds of them, and he doesn't know whether that is the snatch block, or not.

Mr. Andersen: His answer is satisfactory.

Mr. Burns: By the way, which is the snatch block and which is the pad-ring?

A. That is the snatch block (indicating). [121]

Mr. Burns: You mean the one on the right-hand side of the picture is the snatch block?

Mr. Andersen: The one that is in the center, isn't it?

Mr. Burns: The right-hand block is the snatch block, is it?

Mr. Andersen: The one that is open is the snatch block, isn't it? A. Yes.

Mr. Burns: And the other one is what?

A. It is a lead block for the guy.

Mr. Andersen. Q. Now, looking at the entire thing there—the hoist rack, and the masts the way they are, and that block there, and that pad-ring that you have described, wouldn't you say that is a picture of the mast-house on the "Maunalei"?

A. I wouldn't because it might be a picture of a mast-house on a number of ships that I have seen.

(Deposition of Charles Wood Encell.)

Q. Do you know whether that vessel has any twin ships? A. I do.

Q. How many?

A. I know of the "Maunawili".

Q. Is that the only one you know of?

A. I have seen lots of them with mast-houses like that.

Q. Looking at that picture wouldn't you say that was a picture taken of the mast-house on the "Maunalei"?

A. I would say I don't know.

Q. You don't know? A. No.

Mr. Andersen: All right. I will offer this photograph for identification. [122]

(Photograph referred to marked "Plaintiff's Exhibit for identification No. 1.")

Mr. Andersen: Q. Now, in relation to that picture there, where was Hansen working, if you can describe it?

Mr. Burns: Of course, he said he doesn't know whether that is a picture of the ship, or not.

Mr. Andersen: That is true, but assuming that is——

A. Not only that, but I couldn't swear which is forward and which is aft on it, or whether it is the port or the starboard side.

Q. You couldn't swear to that? A. No.

Q. Assuming that is the starboard side just for the purpose of explanation—assuming that is the

(Deposition of Charles Wood Encell.)

starboard side of the ship, where would you say he was working?

Mr. Burns: You mean further assuming that is the mast-house on the "Maunalei"?

Mr. Andersen: That is correct, and just at or prior to the time he was injured.

A. Is that a fair question, considering that I don't even know whether that is the "Maunalei" or not?

Mr. Burns: You can answer it as best you can. He is asking you to make assumptions, and any answer you give is based upon those assumptions. it is not a fair question.

Mr. Andersen: I submit it is. I could draw a diagram if I wish, and it would serve the same purposes as that picture.

A. That is a photograph of the mast-house on some ship, but [123] I do not know which ship, nor which side of the mast-house it is.

Q. Well, let us assume that I have drawn a picture which just shows what is in that photograph, and I have drawn a picture of the mast-house on the "Maunalei", showing the pad-ring and the snatch block and the hose. Now, in relation to what I have supposedly drawn, but which is actually shown in that photograph, where was Hansen working just prior to this accident?

A. In the first place, that snatch block wouldn't have been in that pad-ring anyway when he was working there.

(Deposition of Charles Wood Encell.)

Q. All right. We can eliminate the snatch block from the picture. We won't eliminate the mast-house. Assuming that is the pad-ring, and couldn't be moved, where was Hansen working at the time I mentioned?

A. Is that a fair question?

Mr. Burns: Well, just assuming that is the ship, and if it does show on the photograph where the pad-ring is.

A. And assuming again that is the starboard side of the mast-house?

Mr. Burns: Yes, that is right.

A. And assuming again that that would make this the No. 1 boom up here, and that guy on that cleat was where he was working, he was standing facing that slacking.

Mr. Andersen: Q. In other words, in the right-hand lower center of the picture, just to the right of the hose reel, there [124] is a cleat apparently riveted on to the mast-house, and there is a rope around that cleat?

A. This cleat here, do you mean (indicating)?

Mr. Burns: Yes.

Mr. Andersen: Q. There is a top and a bottom cleat, so you would say he was working right alongside of this cleat which I have already indicated in the record, is that correct?

Mr. Burns: You mean if that is the approximate location?

(Deposition of Charles Wood Encell.)

Mr. Andersen: With the assumptions that you mentioned. A. Yes, I would.

Q. Would you put an ink cross there, if you will, on the margin?

Mr. Burns: That is all right.

A. You mean in the margin out here—alongside here (indicating)?

Mr. Andersen: Yes.

(Witness made "X" on "Plaintiff's Exhibit for identification No. 1.")

Q. That indicates the cleat near where he was working? A. Yes.

Q. He was within a foot or two of there?

A. What part of his body?

Q. Hansen we will say would be within a foot or two of that cleat?

A. I would say his hands were, yes.

Mr. Andersen: All right. That is close enough.

Q. And I assume at this time the weather was fair? [125]

A. Yes, it was.

Q. It was about 1:00 o'clock in the afternoon?

A. It was after 1:00 o'clock some time. They started working at 1:00 o'clock.

Q. It was some time between 1:00 and 3:00, let us put it that way? A. Yes.

Q. It was some time between 1:00 and 3:00?

A. Yes.

Q. What were your duties that day?

A. I had the bridge watch.

(Deposition of Charles Wood Encell.)

Q. You had the bridge watch? A. Yes.

Q. And you were at that time the chief officer on watch on the bridge, were you?

A. I was the second officer.

Q. Was there another officer on the bridge also?

A. Not on the bridge. The chief officer was on the deck directing the work of topping the booms.

Q. Were you in charge of the navigation of the ship?

A. I was the navigator, yes.

Q. You were the navigating officer?

A. Yes.

Q. In charge of the welfare of the ship so far as the navigation of the ship was concerned at that time and place? A. Yes.

Q. And that was your duty?

A. Yes, that was my duty.

Q. I do not understand you to say, do I, that during all of this operation of topping these booms that you were devoting your attention to the topping operations rather than the navi- [126] gation of the ship? A. You do not.

Q. That is right.

A. It was right there in front of me.

Q. In other words, you sort of took this into your glance as you were navigating the ship, is that right?

A. I was not working any navigation problems at the moment. I was all finished for the time being.

(Deposition of Charles Wood Encell.)

Mr. Burns: Perhaps you do not understand. He was not steering the ship.

Mr. Andersen: I know he was not steering the ship.

A. My duty was navigator, and I was on watch on the bridge, and my duties among other things are to keep a good lookout for things off of the ship, and away from it, and for things on the ship as well.

Mr. Andersen: That is right.

Q. So that your primary duty there, of course, was the navigation of the ship, wasn't it?

Mr. Burns: He has answered that question.

A. And the lookout.

Mr. Andersen: Yes. And the lookout.

A. And the general condition and operations on the deck; anything. I make a lookout all of the time over what I can see of the ship, and the deck, as well as for other ships.

Q. For the welfare of the ship? A. Yes.

Q. In other words, you at that precise moment—at that time between 1:00 and 3:00 o'clock—were responsible for the welfare [127]of the ship?

A. No, I wouldn't say that.

Q. Well, I mean you were the chief officer on watch on the bridge at that time, weren't you?

A. I wasn't on the deck.

Q. You were on the bridge?

A. I was on the bridge.

Q. That is right. All right. Now, you weren't paying any particular attention to Hansen, were you?

(Deposition of Charles Wood Encell.)

A. I was paying attention to—I took in everything; I watched the whole operation—all of them.

Q. Yes. You were interested in the operation, weren't you? A. That is right.

Q. But you were not paying any particular attention to any one particular person, were you?

A. No.

Q. And you did not actually see Hansen get his hand in the block, did you? A. No.

Q. And you were not watching him that closely, were you? A. No.

Q. Because if you had you probably would have been able to stop the winch——

A. That is right.

Q. That is correct, isn't it?

A. That is correct.

Q. So you were not paying particular attention to Hansen, were you?

A. No, I was not.

Q. You saw him pull his hand out of the block, didn't you? A. After he screamed.

Q. After your attention was directed to him?

A. Yes. [128]

Q. At that particular time, just before he screamed, do you recall the particular operation you were watching?

A. I was watching the general operations.

Q. In other words, you were looking at the whole thing there in front of you? A. Yes.

Q. And your attention was directed to Hansen

(Deposition of Charles Wood Encell.)

not by virtue of anything he was doing, but by reason of the fact that you heard his yell, is that correct?

A. I had noticed Hansen before that standing there apparently day-dreaming.

Q. Oh, he was apparently day-dreaming?

A. Yes.

Q. How long before?

A. When the winches were stopped.

Q. When the winches were stopped he had nothing to do, did he? A. No.

Q. And so he was just standing there?

A. Yes.

Q. And how far away from him were you?

A. I don't know exactly.

Q. Well, in distance what was it?

A. I don't know exactly.

Q. The beam of the ship?

A. At least.

Q. At least? A. Yes.

Q. What is the beam?

A. I don't remember the beam of that particular ship. It is around 56 or 58 feet.

Q. So that you were at least the beam of the ship away from him? A. Yes.

Q. Twice the beam?

A. I don't think so. [129]

Q. Somewhere between one and two times the beam of the ship, is that right?

A. I don't know whether that is right, or not.

(Deposition of Charles Wood Encell.)

Q. Well, approximately? I realize in distances a person can't be accurate. Was it approximately that?

A. I don't see why I should guess at something I don't know.

Mr. Andersen: I do not want you to guess. I want your best estimate.

Mr. Burns: I think he has given his best estimate.

Mr. Andersen: Q. We will say approximately one and a half times the beam—would that be your best estimate? A. That or less.

Q. Yes. Now, during the time that Hansen was working there so far as you know he did everything that he was ordered to do, didn't he?

A. As far as I know.

Q. Yes. You were not in charge of him at the moment?

A. I was not in charge of him, no.

Q. And you did not hear anything in particular said to Hansen, did you?

A. I don't remember whether I did, or not.

Q. All you can remember is Rosen saying "Heave ho" a couple of times when they stopped once or twice, is that correct?

A. That is not all I can remember, no.

Q. I mean about this relevant matter. You heard him say to heave on the lines, or whatever it was—I think it was "Heave ho", or something like that which you mentioned.

(Deposition of Charles Wood Encell.)

A. "Heave away."

Q. "Heave away"? A. Yes. [130]

Q. You heard him say that once or twice before Hansen was hurt? A. Yes.

Q. Do you remember Rosen giving any particular directions or orders to Hansen at that time?

A. I was not close enough to hear anything except his loud general orders and the boatswain's.

Q. That is, Rosen's general orders to the crew as they worked on that particular operation?

A. Yes.

Q. That is all you can remember?

A. Well, I don't remember whether he came to him personally, or not.

Q. Where is Mr. Rosen now?

A. He is still mate on the "Maunalei".

Q. And where is the "Maunalei", if you know?

A. I don't know, and it is a military secret anyway.

Mr. Burns: This is off the record.

(Off the record.)

Mr. Andersen: What was my last question?

(Record read.)

Q. Now, I assume that Hansen was injured somewhere between five and fifteen minutes after Mr. Rosen had told him to heave away—that first heave away you mentioned, is that correct?

A. I do not know how long it was.

Q. Well, what is your best estimate?

(Deposition of Charles Wood Encell.)

A. I wouldn't be qualified to estimate it, because I don't know.

Q. Well, as I recall your testimony the lines were set and [131] Rosen gave the order to heave away? A. Yes.

Q. And then the block on the port side was too low? A. Yes.

Q. And had to be changed in order to prevent a chafing of the lines, is that correct?

A. That is right.

Q. And then the lines were slacked, is that correct? A. No, I didn't say that.

Q. At any rate, the winch was stopped?

A. Yes.

Q. So that the lines must have been slacked?

A. No, not necessarily.

Q. Did they change a block without loosening the lines?

A. They lowered the port boom down into the cradle and slacked it.

Q. They slacked the port boom and left the starboard boom taut? A. Yes.

Q. And after they slacked the port boom they shifted the block, and then the mate told them to heave away again? A. Yes.

Q. And then it was while they were heaving that time that Hansen was injured, is that correct?

A. It was immediately after they started heaving.

Q. Immediately after they started heaving?

(Deposition of Charles Wood Encell.)

A. Yes.

Q. The line had to be in motion? A. Yes.

Q. It was while they were heaving that Hansen was injured? A. Yes. [132]

Q. How long would that operation take normally that I have just mentioned?

A. I don't know how long they took. I didn't time them.

Q. How long would it normally take?

A. I imagine fifteen minutes, but I am not sure.

Q. You can say about fifteen minutes, can't you?

A. I wouldn't because I don't know.

Q. You have been going to sea——

A. I didn't time that operation.

Q. You have been going to sea for thirteen years?

A. It depended entirely on how fast they worked.

Q. Well, on that particular day were they going about it in a seamanlike manner?

A. With the shifting of the block, do you mean?

Q. Yes, and the topping of the booms?

A. Yes.

Q. They were going about it in a usual fashion, were they? A. Yes.

Q. You have been going to sea for thirteen years? A. Yes.

Q. And you can't tell us what is the usual length of time that it takes to do what I have just described?

(Deposition of Charles Wood Encell.)

A. You asked me how long it took for that operation.

Q. I asked you how long it usually takes to do what I explained, to heave ho, and draw the lines taut, and lift them up, and find one is too low, and let them down and tighten one block, and heave away again—how long would that take? [133]

A. Probably ten or fifteen minutes.

Q. Yes. That is what I thought. Well, Hansen wasn't on the side where the line was slacked, was he? A. No.

Q. He was on the other side?

A. That is right.

Q. And after they were told to heave away, all Hansen had to do was to stand there, isn't that correct, and just keep clear?

A. What is that?

Q. I mean after the winch was grinding, there was nothing more for Hansen to do, was there?

A. Yes, there was.

Q. What?

A. Slack off the guy on the cleat as the boom came up.

Q. In other words, that is to steer it and keep it in position, and to see that it doesn't——. Well, you explain it to me.

A. Well, when the boom is raised up, the guy is raised up with it.

Q. Yes.

A. And it is made fast to the boom head, and it

(Deposition of Charles Wood Encell.)

becomes tight; it will break off if it is made solid, and he has to keep it winged out a certain distance and in enough to clear the ship's side.

Q. He has to steer the end of that boom on the way up, that is correct, isn't it?

A. You might call it steering or guiding it.

Q. Yes, guiding it. I am not a sailor, and sometimes I might use the wrong term, but the general idea is there. This [134] line apparently was on that mast-house cleat there, and he was snubbing it on this cleat, is that correct?

A. He was slacking it off as it needed slacking off.

Q. Yes, that is right. He would slack off in the same ratio that the boom was hoisted, is that correct? A. Practically.

Q. Yes.

A. No, not that fast, because it is hoisted by the topping lift, and as it comes up the boom must wing out a little bit to secure them if the ship rolls.

Q. But that is substantially so? A. Yes.

Mr. Burns: It is not the same ratio.

A. It is not the same speed.

Mr. Andersen: Q. It is not the same speed?

A. No, it is not the same speed.

Q. He probably would be a little bit slower than the winch? A. Yes, much slower.

Q. When did he do this day-dreaming that you mentioned?

(Deposition of Charles Wood Encell.)

A. I noticed him day-dreaming while they were shifting the block on the other side.

Q. When they were shifting the block on the other side he was standing there with his hands on the line, was he?

A. On the guy line, do you mean?

Q. Yes.

A. Yes, he was standing there with his back to me part of the time. I don't know what he had his hands on.

Q. That was where he was supposed to be, wasn't it? A. Yes. [135]

Q. And what did he do at that time that he was not supposed to do?

A. He must have put his hand on the topping lift.

Q. Well, now, did you see him do that? Did you see him put his hand on the topping lift?

A. I told you I didn't see him put it on there, but I saw him pull it out of there.

Q. You saw him pull it out, that is right.

A. And he certainly——

Q. And did you see him——

Mr. Burns: Just a moment. Let him answer the question.

A. He wasn't supposed to put his hands on it, and there was no reason or no excuse for him doing so.

(Deposition of Charles Wood Encell.)

Mr. Andersen: I move that all be stricken as not responsive——

Mr. Burns: It is responsive to your question.

Mr. Andersen (Continuing): ——and also calling for the opinion and conclusion of the witness. The question was——

Mr. Burns: Just a moment. I might state you asked what he was doing that he was not supposed to do.

Mr. Andersen: The witness said "he must have," and that was merely a conclusion of the witness.

Mr. Burns: He answered your question.

Mr. Andersen: My motion is in the record?

Mr. Burns: Yes.

Mr. Andersen: Q. But when he was standing there day-dreaming, as you mentioned, what do you mean by the term that he was day- [136] dreaming? What was he doing that he shouldn't have done? Don't tell me what he must have done, or what he might have done. Tell me what he did that you saw, if anything.

A. For instance, what do you mean by "he did"?

Q. That is up to you. You told me he was standing there day-dreaming. A. Yes.

Q. What do you mean by day-dreaming?

A. I think that is quite plain English.

Q. Well, it is not to me. I do not know what you mean by it. What do you mean by day-dreaming?

(Deposition of Charles Wood Encell.)

A. I mean he was probably thinking about something else besides what he was doing.

Q. In other words, you are telling me what you think he thought, is that correct?

Mr. Burns: No.

A. I didn't mention what he thought.

Mr. Burns: He is telling you what he observed, and then you asked him——

Mr. Andersen: In other words——

Mr. Burns: Just a moment. And then you asked him for a definition of day-dreaming, and he is giving you his definition.

Mr. Andersen: My question was to give a definition of day-dreaming.

Q. He just stood there? You just saw him standing there, didn't you?

A. You mean did he just stand there?

Mr. Andersen: Yes. [137]

A. Or did I see him stand there?

Q. What was he doing?

A. He may have done something that I didn't see him do.

Q. What I want you to tell me, at this moment just before the second command to heave away was given, and at the moment you did see him, I want you to tell me what he was doing.

A. He wasn't doing anything much that I noticed.

Q. Now, tell me, was he where he was ordered to be?

(Deposition of Charles Wood Encell.)

Mr. Burns: Well, that has been asked and answered.

Mr. Andersen. This is cross-examination.

Q. Was he where he was ordered to be?

A. Yes, he was.

Q. At the moment was he doing what he was ordered to do?

Mr. Burns: At what moment?

Mr. Andersen: At the moment you saw him.

A. Which moment?

Mr. Andersen: This is the time he saw him.

A. I saw him several different moments.

Q. At any one of those several different moments before he was hurt was he following out his orders?

Mr. Burns: If he knows.

Mr. Andersen: Yes, if you know.

A. I don't know.

Q. You don't know? A. No.

Q. Did you see him do anything incompatible with any orders you heard given?

A. I saw the result of it when [138] he pulled his hand out of the block.

Mr. Andersen: I move that be stricken as not responsive.

Q. Did you see him doing anything incompatible with the orders he was given?

A. I noticed his inattention to his work, and what I called his day-dreaming.

Q. What was his inattention to his work—describe it, please?

(Deposition of Charles Wood Encell.)

A. He was standing there appearing to be thinking about something else.

Q. All right. Now, when the first order was given to heave away, and Hansen was on the starboard side, did he slacken off on that cleat?

A. He did.

Q. He did. The order was given to stop, was it?

A. It was.

Q. And he stopped slacking, didn't he?

A. Yes.

Q. And when the next order was given to heave away, and just before he was hurt, did you see Hansen at that time?

A. Yes, I saw them all.

Q. Did you see Hansen particularly?

A. At that particular moment just before they started?

Q. Yes. A. I don't remember.

Q. You don't remember?

A. It was a long time ago.

Q. All right. You don't remember. By the way, with respect to that deck load, you know that several complaints had been made about that deck load shifting, and it being unsafe there?

A. No, I do not. [139]

Q. You never heard anything about that?

A. No.

Q. When that steel was loaded aboard the vessel was it lashed or shored before leaving San Francisco? A. It was.

(Deposition of Charles Wood Encell.)

Q. It was both lashed and shored?

A. It was lashed. I don't know whether it was shored, or not.

Q. You have no recollection of that?

A. I don't remember that particular deck load that clearly.

Q. Was there a man named Putnam working near Hansen at the time?

A. There was a man named Putnam, an ordinary seaman, on the ship at that time. I don't remember just where he was placed during this operation.

Q. You do not remember seeing him during this operation?

A. I saw them all, but I do not remember where this particular man was.

Q. Was there a man named Rasmussen there at that particular time?

A. There was a man named Rasmussen on board the ship at that particular time, but I do not remember whether he was there at that time, or not.

Q. Was he an A. B.? A. He was an A. B.

Q. Was there a man named Campbell on board the ship? A. Yes.

Q. Was there a man named Snyder?

A. I do not remember Snyder.

Q. Harold Snyder?

A. I do not remember him. [140]

Q. All of the seamen were engaged in this operation, weren't they? A. All except one.

(Deposition of Charles Wood Encell.)

Q. And which one was that?

A. I don't know which one it was. One of them was at the wheel, but I don't remember which one it was that was at the wheel at that time.

Q. There was one seaman at the wheel at the time? A. Yes.

Q. By the way, when Hansen reported to you he reported to you on the bridge, didn't he?

A. Yes.

Q. And you saw his hand, did you not?

A. I couldn't see it clearly. I saw blood on his hand. He was holding his left hand with his right like that (indicating).

Q. You did not see it thereafter, I assume?

A. It was bandaged up the next time I saw it.

Q. You saw the blood on his hand?

A. Yes.

Mr. Burns: This is off the record.

(Off the record.)

Mr. Andersen: Q. I show you another picture. Do you recognize that?

(Photograph handed to Mr. Burns and thereafter to the witness.)

A. As what?

Q. Do you recognize anything in that picture?

A. I recognize it as a deck and a deck load of a ship.

Q. That is all you recognize?

A. I might recognize more [141] details in it, yes.

(Deposition of Charles Wood Encell.)

Q. Well, you recognize there is a winch here, don't you? A. Yes.

Q. And you recognize what appears to be steel, don't you? A. Yes.

Q. Was that part of the condition of the deck load of the "Maunalei" on January 15th, or during that voyage?

A. It may or may not have been.

Q. You wouldn't say yes or no?

A. I wouldn't say whether that was that ship, or some other ship. There is nothing to indicate what ship it is.

Mr. Andersen: I will offer this as "Plaintiff's Exhibit 2 for identification."

(Photograph referred to marked "Plaintiff's Exhibit for identification No. 2.")

Q. I will show you another picture.

Mr. Burns: Let me see it.

(Photograph handed to Mr. Burns.)

Mr. Andersen: Q. Do you recognize the picture handed to you by Mr. Burns?

(Photograph handed to the witness.)

A. As what?

Q. As anything.

A. I recognize the scenery back there as Honolulu Harbor.

Q. As Honolulu Harbor? A. Yes.

Q. You don't recognize the ship or the load, of course, do [142] you?

A. I couldn't identify that ship or the load, either.

(Deposition of Charles Wood Encell.)

Q. Or the man in the picture? A. No.

Q. Or anything about that picture. A. No.

Q. You couldn't identify it as having seen it before, could you?

A. There are so many scenes similar to that it might be any one of them.

Q. You couldn't identify this as having been anything you ever saw before, then? A. No.

Mr. Andersen: I will offer this as "Plaintiff's Exhibit No. 3 for identification."

(Photograph referred to marked "Plaintiff's Exhibit for identification No. 3.")

Q. Can you describe Mr. Hansen to me?

A. I am not very good at describing people.

Q. Well, describe him as best you can?

A. Is that necessary?

Mr. Burns: Yes, you will have to answer that question if you can, and if you remember what he looked like.

A. He was about medium height and medium build, I should say.

Mr. Andersen: Q. About how old?

A. I should imagine he was in his thirties, but I don't know.

Q. Sort of ruddy complexion?

A. I wouldn't say; I wouldn't know.

Q. By the way, this deck load shifted right after you left the Golden Gate, didn't it—right after you got out of the [143] heads?

A. It wasn't very far out from the heads.

(Deposition of Charles Wood Encell.)

Q. Shortly after you went through the Gate, is that true?

A. I have seen so many deck loads shift at sea many different times that I do not remember the times or the details. It has been a long time ago.

Q. According to the best of your recollection this deck load shifted shortly after you left the Golden Gate?

A. I should say it was probably about five or six days before we got to Honolulu, but I don't remember exactly what day it was.

Q. By the way, when Hansen was working there, which way was this No. 1 boom being lifted?

Mr. Burns: Which one—the starboard or the port?

Mr. Andersen: This starboard boom.

Q. He was guiding the starboard boom, No. 1 boom starboard, isn't that correct?

A. He was slacking the guy on that.

Q. He was slacking the guy on that?

A. Yes.

Q. And which way was he facing in doing that?

A. He was facing the cleat.

Q. He was facing the cleat?

A. That the guy was made fast to.

Q. You mean he was standing right in front of it and facing with his face facing the cleat and the mast-house, or would he be looking forward?

A. He would be looking more or less forward.

[144]

(Deposition of Charles Wood Encell.)

Q. More or less forward? A. Yes.

Q. Sort of standing in a cater-cornered position looking at the cleat and the boom at the same time?

A. I didn't pay enough or particular attention to tell how he was standing and to remember exactly how he was facing.

Q. And you heard this cry of "Ouch" how long after the second command to heave away?

A. Almost immediately.

Q. You say almost immediately? A. Yes.

Q. You do not know how many feet of line had run out? A. No.

Q. You would have no idea?

A. Not very much.

Mr. Andersen: I think that is all.

Redirect Examination

Mr. Burns: Q. Now, when you said almost immediately you heard "Ouch" after the cry of "Heave away", did you mean after that, or after the winches had started?

A. After the winches started.

Q. In other words, there was an order by Mr. Rosen to heave away, and then the boatswain said something, didn't he?

A. Then the boatswain said "Everybody clear, we are going to heave away."

Q. And then he started the winches?

A. Yes.

Q. And then you heard the cry of "Ouch"?

A. Yes. [145]

(Deposition of Charles Wood Encell.)

Q. At the time you observed Mr. Hansen and the operation of raising the booms, you were on the bridge? A. I was.

Q. The bridge was higher than the deck on which they were working on the booms, is that correct?

A. Yes.

Q. So that you were looking down on them?

A. Yes.

Q. Down and at an angle? A. Yes.

Q. They were forward of you and down from you? A. Yes.

Mr. Burns: That is all. Is that all, Mr. Andersen?

Mr. Andersen: That is all. [146]

State of California,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on the 9th day of March, 1942, at 8:30 o'clock P. M., before me, Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, State of California, at the office of Messrs. Brobeck, Phleger & Harrison, Room 1100, 111 Sutter Street, San Francisco, California, personally appeared pursuant to oral stipulation between counsel for the respective parties, Charles Wood Encell, a witness called on behalf of the defendant herein, and Messrs. Andersen & Resner, represented by George R. Andersen, Esquire, appeared as attorneys for the plaintiff; and Messrs.

Brobeck, Phleger & Harrison, represented by Robert Edward Burns, Esquire, appeared as attorneys for the defendant; and the said Charles Wood Encell being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Frank L. Hart, a competent official and disinterested shorthand reporter, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by him, and by stipulation between counsel for the respective parties, the examination and reading of the deposition by the witness and the signing thereof were waived.

And I further certify that the said deposition has been [147] retained by me for the purpose of securely sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that the exhibits hereto attached and marked "Plaintiff's Exhibits for identification Nos. 1, 2 and 3," are the exhibits referred to and used in connection with the deposition of said witness.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of

San Francisco, State of California, this 12th day of March, A. D. 1942.

[Seal] EUGENE P. JONES,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed July 3, 1942. [148]

Mr. Burns: There is just one other matter. Counsel, perhaps, will be willing to stipulate to it, and that is that the distance between the mast house and these steam guards is 35 inches.

Mr. Andersen: I think that is what it is.

Mr. Burns: From the mast house to the inner side of the steam guard it is 35 inches.

Mr. Andersen: I will stipulate that is substantially correct. [149]

Mr. Burns: And from the mast house to the outside of the steam guard is 51 inches; in other words, the steam guard is as wide as the difference between 35 inches and 51 inches, which is 16 inches.

Mr. Andersen: I will so stipulate.

Mr. Burns: That is all. I rest.

Mr. Andersen: I have a little rebuttal, your Honor.

CHARLES HANSEN,

Recalled in rebuttal.

Mr. Andersen: Q. Mr. Hansen, directing your attention to this part of the blackboard which was partly made by me and partly by Mr. Rosen, this No. 1 indicates the spot where Mr. Rosen said you were standing just before your hand went in the block. Were you there at that time? A. No.

Q. Would you come down here and explain to the Court just where you were at just about the time that you got your hand caught in that line? Stand over here, so that the Judge can see it.

A. This is where the cleat was for the outboard guy, and I had to stand here——

Q. Just state where you were.

A. Right here.

Q. In other words, you were at the side of the cleat?

A. I was standing about twelve inches away, right here. Here is the cleat, as you can see in the picture.

Q. In other words, that is where you were standing before. At the time that you were hurt where were you?

A. At the time I was hurt, I was coming back across the deckload toward this snatch block, and I was about here—I should say—you see that snatch block extends from the mast house, I would say, pretty close to two feet, I think it is two feet. The reason that snatch block [150] is so far out from the mast house is so that it will not interfere with

(Testimony of Charles Hansen.)

that. You see, this is the topping lift going over here, and it is going from this snatch block over to the railing. I am coming back, and I fell into that topping lift about here, I would judge. In other words, I think I was nine or twelve inches away from the block when my hand was dragged in by the topping lift, and I pulled it out.

Mr. Andersen: That is all.

Cross Examination

Mr. Burns: Q. Mr. Hansen, you said that you had gone to sea over a period of years?

A. Over a period of 29 years.

Q. Most of the time you have been in the steward's department? A. No.

Q. Didn't you serve in the steward's department about three years?

A. I served on the "Mariposa" in the steward's department in 1934 or 1935.

Q. Hadn't that been most of your experience?

A. No.

Q. In 1924 you were assistant to the manager at the Royal Hawaiian Hotel, were you not?

A. I was for about a year and a half assistant to the manager.

Q. Then after that time you also worked for the Palace Hotel?

A. No, before that time, that was before 1924.

Q. Before 1924? A. Yes.

Q. After 1924 you worked at hotels?

A. In 1924, the last part of 1924 to the early part

(Testimony of Charles Hansen.)

of 1926 I was assistant to the manager of the hotel in Honolulu.

Q. After that didn't you work at some hotel?

A. After 1926?

Q. Yes. A. No.

Mr. Burns: That is all.

Mr. Andersen: That is our case. [151]

The Court: Is the matter submitted?

Mr. Andersen: Yes.

Mr. Burns: Yes.

The Court: Plaintiff brings suit against the defendant under the provisions of the Jones Act. He sues for damages for personal injuries. In his complaint he alleges, among other things, that on or about the 15th day of January, 1941, while he was working upon the deck of the vessel called "Mauna Lei," owned by the Matson Navigation Company, he met with an accident, and his left hand was seriously injured. After listening to all of the evidence in the case, it seems to me that the question upon which the decision will turn is whether there was any negligence on the part of the defendant.

At or about the time the accident happened, the plaintiff was working on the starboard side of the vessel, near the mast-house, and he was attending to some guy lines at the time that orders had been given to prepare the booms on the vessel ready for unloading the cargo.

The undisputed evidence here shows that the plaintiff was injured. It shows, further, that a lot of steel was stowed on the deck of the vessel, and that that steel had shifted, and I think that the evidence further shows that the deck cargo was in a somewhat loose condition. This is particularly borne out by the testimony of the captain of the vessel, who produced a diagram showing the shifting and loosening of the cargo.

The only dispute there seems to be in this case is whether the plaintiff attempted to adjust or fasten the block on the starboard side, which was a part of the boom. The plaintiff tells, with some particularity, what he did, and the circumstances under which he did it. He is corroborated by the witness Peter Lecht, [152] who was the boatswain in charge of the winches. The chief mate, Mr. Rosen, mentions Mr. Lecht as his assistant. Mr. Lecht says that he called the plaintiff's attention to the fact that something appeared to be wrong with the block on the starboard side, and directed him to fasten it in such a manner as to prevent an accident happening, and Mr. Lecht states that he observed the plaintiff going to the block on the starboard side and tying it, and that he saw him returning to his place, but lost sight of him before the accident happened.

As has been stated by counsel for plaintiff, the defendant owed a duty to every man on that ship, a paramount duty, and that duty is to give a safe place to work. Surely, it cannot be said that there was a safe place for sailors to work on the deck of that

ship on January 15, 1941. The testimony, as I say, is undisputed that there was a shifting of the deck cargo, a cargo composed of heavy steel beams, on top of which was a lot of steel strips used for reinforcing concrete. The captain, in his testimony, mentioned those strips, and how they appeared to him after the accident, and the impression I got from the testimony was that they were loosely arranged on top of the steel beams—surely a dangerous place for anybody to attempt to walk upon at sea, while the ship was in motion.

I believe the testimony of Mr. Lecht, and I also believe the testimony of the plaintiff, with regard to how the accident happened.

The witness Rosen, as he truthfully said, was in no position to see what did happen at the time that Hansen made his trip across the deck load and back, as he was busy attending to some adjustment of the blocks on the port side of the vessel; and he made it quite clear that it might be possible for the accident [153] to happen, as described by the plaintiff, without his seeing it.

I think that the defendant is guilty of negligence, in that it did not provide the plaintiff with a safe place to work. The captain explained that, because of the manner in which the ship was constructed, it would be most impractical to shore up the cargo and make it safe, and that may be true; notwithstanding that fact, it was the duty of the defendant to see to it that that cargo was securely fastened, and the evidence shows that it was not.

As has been suggested here by counsel, sailors are engaged in a dangerous occupation. The law recognizes that fact, and is mindful of the dangerous duties of a sailor, particularly as it has provided that the doctrine of assumption of risk and contributory negligence do not apply in any negligence case brought by a seaman. The admiralty doctrine of comparative negligence applies.

There is nothing in the evidence to show that the plaintiff was guilty of carelessness in what he did. He seems to be free from any blame, whatsoever. I find, as I say, that the defendant is guilty of negligence as charged in the complaint.

The plaintiff has received a serious injury to his hand. I have no doubt that he will be able to work as a seaman and to use the hand, maybe not to the fullest extent, but I notice from the testimony of Dr. Jones that very good results were obtained from the treatment at the Marine Hospital, and that the plaintiff has been advised to return to work, which he has done.

Under all the circumstances, I am of the opinion that $2000 would be about the right sum to allow the plaintiff as damages, and it is ordered that plaintiff recover that sum from the defendant, together with his costs. [154]

Counsel for plaintiff may prepare and submit findings of fact and conclusions of law to the Court.

Mr. Andersen: Yes, your Honor.

[Endorsed]: Filed July 3, 1942. [155]

[Endorsed]: No. 10186. United States Circuit Court of Appeals for the Ninth Circuit. Matson Navigation Company, a corporation, Appellant, vs. Charles Hansen, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 3, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10186

MATSON NAVIGATION COMPANY,
a corporation,

Appellant,

vs.

CHARLES HANSEN,

Appellee.

CONCISE STATEMENT OF APPELLANT'S POINTS ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF.

Appellee Charles Hansen was employed as an able bodied seaman on the S. S. Mauna Lei owned and

operated by the appellant Matson Navigation Company. The vessel carried a deck load of steel beams and bars which was stowed on each side of the forward deck. After the vessel left port the deck load shifted when the vessel encountered stormy seas.

On January 15, 1941 the vessel, proceeding on its voyage, was scheduled to arrive at Honolulu the next day. Pursuant to custom and in anticipation of arrival at port, the crew was ordered to the forward deck for the purpose of raising the booms and making the gear ready for discharge operations. During the course of this operation and while appellee was on or near the deck load, appellee was injured when his left hand was drawn by a moving line into a snatch block. The District Court held that the appellant was negligent in failing to supply the appellee with a safe place to work.

The points on which appellant will rely are these:

1. The District Court erred in finding that the appellant failed to provide the appellee with a safe place to work.

2. The District Court's finding that appellant had failed to provide appellee with a safe place to work is, in effect, a finding that it is negligence for a vessel to carry a deck load; and in so finding the court erred.

3. The District Court erred in finding the appellant guilty of negligence with respect to the condition of the deck load where the sole evidence was

that the deck load on the vessel was shifted by the action of the seas through no fault of appellant.

4. There is no evidence of negligence on the part of appellant and the District Court erred in its finding of negligence.

5. There is no evidence that any act or omission of appellant proximately caused the injuries of appellee and the District Court erred in finding that proximate cause had been proved.

6. The court erred in denying appellant's motion for dismissal made upon the ground that upon the facts and law appellee had shown no right to relief.

Appellant designates the following portions of the record which it thinks necessary for the consideration of this appeal:

1. The Complaint.

2. The Answer of Defendant Matson Navigation Company.

Notice of Appeal.

3. Reporter's Transcript of Evidence at the Trial of Case.

4. Deposition of Charles Wood Encell.

5. The Opinion of the District Court.

6. Appellant's Motion for Dismissal.

7. Order Denying Motion for Dismissal.

8. The District Court's Findings of Fact and Conclusions of Law.

9. The Judgment.

Dated: July 6, 1942.

Respectfully submitted,
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Attorneys for Appellant
Matson Navigation
Company

Due service and receipt of a copy of the within is hereby admitted this 6th day of July, 1942.

ANDERSEN & RESNER
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 6, 1942.

No. 10,186

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

CHARLES HANSEN,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 10,186

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BRIEF FOR APPELLANT.

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

The District Court for the Northern District of California, Southern Division, had jurisdiction because this action was brought under Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, Title 46, United States Code, Section 688 (R. 3),* and the amount involved in the action was over three thousand dollars ($3000.00) (R. 4). The action was instituted by plaintiff, Charles Hansen, a merchant seaman, against Matson Navigation Company, a California corporation, with its principal place of business in San Francisco, California (R. 2, 6). The defendant

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*The record is referred to throughout this brief by the designation "R".

was the owner and operator of the vessel Mauna Lei (R. 6), and plaintiff by his complaint sought damages for personal injuries received while employed as a seaman on that vessel (R. 1-4).

Issue was joined by the answer of the defendant, Matson Navigation Company, which admitted ownership and operation of the vessel and the employment of plaintiff as an able bodied seaman on the vessel (R. 6, 7).

From a final judgment in favor of plaintiff (R. 12) this appeal has been taken pursuant to Rule 73 of Federal Rules of Civil Procedure (R. 13). This Court has jurisdiction of the appeal under Title 28, United States Code, Section 225, Subdivision (a), Part First, and Subdivision (d).

STATEMENT OF THE CASE.

A. THE ACTION.

This is an appeal by the defendant, Matson Navigation Company, from a judgment against it in an action for personal injuries under Section 33 of the Merchant Marine Act of 1920, commonly called the Jones Act (Title 46, United States Code, Section 688). Defendant and appellant is a corporation, and plaintiff and appellee was one of the defendant's employees who was employed as an able bodied seaman on the vessel Mauna Lei at the time of the accident. The action is predicated upon the claim that Matson was negligent in failing to supply Hansen with a safe place to work by reason of the negligent stowage of

a deck cargo of steel and by reason of oil on the deck and deck cargo (R. 2, 3). Plaintiff claimed that as a result of such negligence, he slipped and fell and, in falling, involuntarily grasped a moving line whereby his hand was guided into a block and injured (R. 3).

The vessel carried on its forward deck a load of steel beams and bars which were stowed and lashed between the hatch coamings and railings on both the port and starboard sides of the vessel (R. 85, 86). The deckload was shifted by the action of the sea after the vessel left San Francisco and before plaintiff's accident (R. 161).

The answer denies that defendant was negligent in any respect toward plaintiff and denies that defendant negligently failed to supply plaintiff with a safe place to work (R. 7). By affirmative defense, the answer alleged that plaintiff's own carelessness directly and proximately caused the injury and that the risk of sustaining such an injury was one incidental to plaintiff's employment as a seaman (R. 7, 8). The Court, sitting without a jury, found that defendant negligently failed to provide plaintiff with a safe place to work in that the deckload was negligently stowed so that it shifted and fell over, and became rough and uneven, and in that there was oil on the deckload (R. 10). The Court further found that as a result of this condition plaintiff slipped and fell when he was passing over the deckload and, in falling, his hand was placed on a moving line and carried into a block and injured (R. 11).

B. APPELLANT'S GROUNDS FOR REVERSAL.

The Court, sitting without a jury, having given judgment for plaintiff (R. 12), the grounds on which appellant principally relies in asking a reversal of the judgment are:

(1) The evidence does not prove that defendant negligently failed to supply plaintiff with a safe place to work.

This contention is raised under Rule 52 of the Federal Rules of Civil Procedure upon the ground that the finding of fact of negligence is clearly erroneous.

(2) The evidence does not prove that plaintiff was negligent with respect to the stowage or maintenance of the deck cargo.

This contention is raised under Rule 52 of the Federal Rules of Civil Procedure upon the ground that the finding of fact of negligence is clearly erroneous.

C. STATEMENT OF FACTS.

Charles Hansen, appellee, claims that on January 15, 1941, he "slipped and fell" and was injured while walking on a deckload of steel on the SS. Mauna Lei (R. 3). Appellee did not claim that he "tripped"; and he admitted that while the ship was rolling he was thrown from his feet and fell (R. 47).

The Mauna Lei sailed from San Francisco bound for Honolulu on January 8, 1941 (R. 98). It carried

a deck cargo of steel beams of from 40 to 60 feet in length and steel reinforcing bars (R. 85). The steel was piled about 4½ feet high (R. 94). It was stowed on the port and starboard sides of the forward deck on 4 inches of dunnage to give sufficient space so that it could be properly secured with four half-inch steel chains and steel cable lashings fastened with turnbuckles (R. 85, 86). The chains and steel cables were passed under and over the steel and the turnbuckles were fastened to eye bolts on the ship's sides and on the hatch coamings (R. 85, 86).

The uncontradicted testimony is that it is customary on vessels of this type to carry deck cargo (R. 87, 98). In fact, this deck cargo, consigned to Army Engineers in Honolulu, could not have been stowed below decks because the steel beams were longer than the hatch openings (R. 85, 87). The uncontradicted testimony is that the steel was stowed and made fast in a customary, safe, and seamanlike manner (R. 100, 88). In addition to the regular chain lashings, there were extra wire-cable lashings (R. 100).

Plaintiff contended and attempted to show that the deck cargo should have been shored by wooden uprights. He was unable to do this. Captain Monroe, a man of 22 years' experience at sea, and the Superintendent of stevedores at San Francisco, supervised the loading of the steel (R. 84). He testified that it was not the custom on flush deck type vessels such as the Mauna Lei to shore deck cargo; that this deck cargo could not be shored because the vessel had no

fixed iron bulwarks on its sides (R. 87, 88). The Master of the vessel, Captain Gordenev, testified to the effect that shoring was not practical on a flush deck vessel for the same reason that there was not sufficient support for shoring (R. 131, 132). There is no evidence of what more could have been done to prevent the deck cargo from shifting when it encountered the storm and heavy seas outside of San Francisco. The uncontradicted evidence is that the deckload was no larger than that which was ordinarily carried (R. 89).

Plaintiff claimed that his accident resulted from an unsafe place to work in that the deck cargo was not properly stowed (R. 2). The only support for this contention is the assertion that the stowage was temporary (R. 22). This was unexplained. It was denied by the Mate (R. 99). The Mate and Superintendent of stevedores described the method by which the cargo was stowed and testified that it was customary, safe, and seamanlike (R. 98, 100, 88).

After the vessel left San Francisco bad weather was encountered. During the night the vessel rolled heavily and waves broke over the forward and after decks of the vessel (R. 100). The log entry made by the Chief Mate, Rosen, shows the "Vessel rolling heavily and taking heavy seas over the deck, fore and aft" (R. 100). There was a strong gale (R. 101). As a result, the deck cargo shifted. The cause of the shifting was the heavy weather and heavy seas coming over the deck (R. 161). The force of the waves was strong enough to flatten the sixteen-inch steel pipes

on the after deck (R. 101). The morning after the storm (January 9, 1941) Captain Gordenev inspected the damage done by the storm and reported his findings in the log book, as follows (R. 123, 124):

> "Vessel inspected and found (1), forward deckload of steel shifted; nothing lost; (2) 17 welded steel pipes of after deckload flattened by sea; (3) few carboys of acid damaged, contents gone; inside of vessel, 17 welded steel pipes flattened by cargo stowed on top. Caterpillar tractor loose, damage slight, if any. General cargo in shelter of deck shifted and some fell."

The steel on the forward deck was too heavy to move or rearrange with the ship's gear and it had to remain as it was (R. 162). Customary practice, however, did not require that the vessel turn back to port after the shifting of the cargo (R. 124, 125).

After the deckload shifted, the chain and steel cable lashings holding the deckload were tightened (R. 101). The turnbuckles were examined every morning and night thereafter and if there was any slack in the lashings they were tightened (R. 130). There was no proof that if the deck cargo had been shored, it would not have shifted.

It was in this setting that the accident to Hansen occurred on January 15, 1941, the day before arrival in Honolulu.

On that day the crew was ordered to the forward deck at 1 P. M. to raise the gear preparatory to arriving in port (R. 102). This is the usual practice on all vessels, weather permitting (R. 142, 158). On this

day the sea was calm (R. 142). The log book showed that there was only a slight breeze and small sea (R. 108).

The members of the crew were assigned to their places by Mr. Rosen, the First Mate. Hansen was assigned to slack away on the starboard guy line of the No. 1 starboard boom while the booms were being raised (R. 102). His position was next to the mast house on the forward starboard side of the vessel (R. 142, 143). He had a space of 3 to 4 feet between the deckload and the mast house within which to work (R. 143). The topping lift line in which he later caught his hand passed into a block on the mast house aft of the cleat on which the starboard guy line was fastened.

After all the men, including Hansen, were in their places, First Mate Rosen gave the order to "Heave Away!" (R. 103, 146); the winches were started by the boatswain; and the No. 1 port and starboard booms started to lift out of their cradles (R. 103, 147). Rosen was standing on the No. 1 hatch facing the boatswain and the place where Hansen was standing (R. 103).

When the booms were about 6 feet out of their cradles, the block on the port rigging slipped and the booms were stopped by order of Rosen (R. 103, 147). The port boom was lowered into its cradle and the starboard boom remained suspended (R. 104). Rosen supervised the adjustment of the block on the port rigging and according to him there were no adjustments of any kind necessary on the starboard rigging (R. 104).

The evidence is conflicting as to where the accident occurred. Plaintiff testified he was standing at his assigned position on the starboard side of the mast house when the booms were stopped (R. 25); that the block on the starboard rigging had slipped (R. 28); that he was told by Lecht, the boatswain, to go and put a "stopper" on it, which he did (R. 30); and that as he was returning over the deckload to his assigned position by the mast house the ship rolled and he was thrown on the topping lift line (R. 47). At that instant the line began to move and his hand was drawn into the block on the starboard side of the mast house and was injured (R. 49).

The mate testified that it was the block on the port, not starboard, rigging which needed adjustment and which required the stopping of the booms (R. 104). This was confirmed by Lecht, the boatswain, when he signed a written statement made shortly after the accident (R. 78-80) but was denied by him in Court (R. 72). Hansen was supposed to stay in his place at the starboard side of the mast house (R. 106). Nothing needed adjustment on the starboard rigging (R. 106).

After the adjustment of the block on the port rigging Rosen gave the order to "Heave away!" (R. 104). The boatswain called out "All clear!" and started the winches (R. 104). An instant later Hansen cried out in pain and was seen pulling his hand out of the block which was attached to the starboard side of the mast house (R. 104). Hansen said he didn't hear the mate give the order to "Heave away!" or the boatswain cry out his warning as he was returning

over the deckload just before the accident (R. 48), although Mr. Encell, the Second Mate, who was on the bridge overlooking the operation, heard both the command of Mate Rosen and the warning of the boatswain (R. 148).

Hansen testified that he was slipping while he walked over the deckload but that just as he was near the edge, the ship was rolling, and he was thrown into the topping lift line (R. 47). The log book entry made on January 15, 1941, shortly after the accident, reads (R. 109):

> "At sea. While topping No. 1 booms AB. seaman C. Hansen was handling starboard outside guy and trying to pull in the slack. *He caught his left hand in the block when the ship took a roll.* He injured his fingers—middle finger cut off and three other fingers injured. The Purser, W. D. Hicks, applied first aid." (Emphasis supplied)

The Court found that there was oil on the steel over which plaintiff claimed that he walked just before the accident (R. 10). The evidence is that there was grease around the winch, but that was a usual condition (R. 70, 108). It is necessary to grease the winches before they may be used (R. 51). At the time of the accident there was less oil than usual around the winches because the deck had been washed clean by the waves in the storm which had occurred after the vessel left port (R. 108). The winch was some distance from where plaintiff claimed he was injured, and the evidence does not show how the oil got on top of the deckload four and one-half feet above the level of the deck.

SPECIFICATION OF ERRORS RELIED UPON.

1. The finding of fact by the District Court that defendant negligently failed to supply plaintiff with a safe place to work (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of evidence.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure which provides in part that when findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the objection has made, in the District Court, an objection to such findings or has made a motion to amend them or a motion for judgment.

2. The finding of fact of the District Court that the deckload of steel was stowed aboard said vessel in such a negligent manner that shortly after leaving San Francisco said steel deckload shifted, fell over, and became uneven (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of the evidence. The foregoing finding of fact of the District Court is in effect a finding that because the deck cargo shifted the appellant was therefore negligent with respect to the stowage thereof.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure.

3. The finding of fact by the District Court that due to the negligent and careless manner in which said deck cargo of steel was maintained aboard the vessel

by defendant, and the oil on the steel beams and around the vicinity in which plaintiff was working, plaintiff slipped and fell and in so falling received injuries (R. 11) is clearly erroneous in that it is unsupported by the evidence and is against the clear weight of evidence.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure.

4. The finding of fact of the District Court that due to the negligence of defendant, plaintiff slipped and fell (R. 11) is erroneous in that it is unsupported by the evidence and contrary to the clear weight of evidence.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure.

THE EVIDENCE DOES NOT PROVE THAT APPELLANT NEGLIGENTLY FAILED TO SUPPLY PLAINTIFF WITH A SAFE PLACE TO WORK.

A. SPECIFICATION OF ERRORS INVOLVED.

No. 1.

The finding of fact by the District Court that defendant negligently failed to supply plaintiff with a safe place to work (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of evidence.

No. 2.

The finding of fact of the District Court that the deckload of steel was stowed aboard said vessel in such

a negligent manner that shortly after leaving San Francisco said steel deckload shifted, fell over, and became uneven (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of the evidence. The foregoing finding of fact of the District Court is in effect a finding that because the deck cargo shifted the appellant was therefore negligent with respect to the stowage thereof.

No. 3.

The finding of fact by the District Court that due to the negligent and careless manner in which said deck cargo of steel was maintained aboard the vessel by defendant, and the oil on the steel beams and around the vicinity in which plaintiff was working, plaintiff slipped and fell and in so falling received injuries (R. 11) is clearly erroneous in that it is unsupported by the evidence and is against the clear weight of evidence.

B. SUMMARY OF ARGUMENT.

Appellee Hansen claimed that he was injured while walking across a deck cargo of steel which had been stowed and made fast in the customary manner with steel chains and cables. The deck cargo was shifted by heavy seas breaking over the vessel after it left port and before the accident. The causes of the accident were the heavy storm which shifted the vessel's cargo, through no fault of appellant, and the rolling of the ship which threw appellee against a moving line. Negligence cannot be predicated upon a situation resulting from conditions outside the control of the person

charged with such negligence. There is no substantial evidence of any negligent act or omission on the part of appellant proximately causing appellee's injuries. The finding of fact of the District Court that appellant negligently failed to supply appellee with a safe place to work is clearly erroneous.

C. DISCUSSION.

1. There must be proof of negligence under the Jones Act.

The gravamen of a Jones Act suit (Title 46, United States Code, Section 688) is negligence, and plaintiff must prove by substantial evidence that defendant acted, or failed to act, as a reasonably prudent man would not, or would have, acted under the circumstances.

> *American Pacific Whaling Co. v. Kristenson,* (CCA 9th), 93 Fed. (2d) 17.

The fact that an accident happens is not proof of negligence. It is incumbent upon the plaintiff to show with reasonable certainty that he was injured as the result of some negligent act of the defendant.

> *Luckenbach SS. Co. v. Buzynski,* (CCA 5th), 19 Fed. (2d) 871, 874, 1927 A.M.C. 1185;
> *Patton v. Tex. & P. R. Co.,* 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361.

In the leading case of *Patton v. Tex. & P. R. Co.,* supra, the Supreme Court, at page 663 of the official report, sets forth the rule that the negligence of an employer must be proved by substantial evidence:

> "The fact of accident carries with it no presumption of negligence on the part of the em-

ployer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. Texas & Pacific Railway v. Barrett, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employe is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe." (Citing cases)

Negligence is usually defined as the doing of some act which a reasonably prudent person would not do or the failure to do some act which a reasonably prudent person would do under the circumstances.

See:

Speer v. Leuenberger, 44 Cal. App. (2d) 236, 246, 112 Pac. (2d) 43.

An application of the phrase "under the circumstances" is found in the disposition made by the Courts of the doctrine of assumption of risk in Jones Act cases. Although that defense has been held not to apply, still in determining whether a shipowner has been negligent toward a seaman, it must be considered that the seaman does assume those risks which are reasonably and necessarily incident to his employment, which by its nature has certain inherent dangers not incident to most shore occupations. This proposition is discussed in *Miller v. Dollar Steamship Lines,* 19 Cal. App. (2d) 206, 64 Pac. (2d) 1163, (hearing in Supreme Court denied), where, at page 210, the Court says:

> "Appellant relies upon the statement in the opinion in Beadle v. Spencer, 298 U. S. 124 (56 Sup. Ct. 712, 714, 80 L. Ed. 1082), reading 'It is unnecessary to repeat here the reasons given in the opinion in The Arizona. supra [298 U. S. 110, 56 Sup. Ct. 707, 80 L. Ed. 1075], for our conclusion that assumption of risk is not a defense to a suit brought by a seaman under the Jones Act for negligent failure of the master to provide safe appliances or a safe place in which to work.' The statement is slightly inaccurate in the broad use of the term 'a safe place in which to work', because, as pointed out in the opinion of Justice Stone in The Arizona, 298 U. S. 110 [56 Sup. Ct. 707, 711, 80 L. Ed. 1075], 'The seaman assumes the risk *normally* incident to his perilous calling' but not of the owner's failure 'to provide a sea-

> worthy ship and safe appliances'. It would have been more accurate to have said in the Beadle case a *reasonably* or *normally* safe place to work because it is apparent that in different parts of the ship there are places of work normally safe for one class of employees which would be wholly unsafe for those of another class. It may be taken as settled law that, though a seaman does not assume the risk of injury caused by unseaworthiness of the ship or by defective appliances, he does assume those obvious or known risks necessarily and reasonably incident to the peculiar type of his employment."

As an incident to his type of employment Hansen assumed the risk of injuries which might result from the rolling of the ship and the danger of being thrown from his feet as a result thereof. Hansen also assumed the risk of injuries which resulted from conditions aboard the vessel which were directly attributable to a peril of the sea and not to the misfeasance of the officers of the vessel. Moreover, appellant had no absolute obligation to furnish appellee with a safe place to work, for that would constitute appellant an insurer. Appellant's obligation was to use reasonable care in accordance with accepted practices of mariners to see that appellee had a safe place to work.

Appellant submits that the evidence, and the clear weight thereof, taken most favorably to appellee, not only fails to show any improper act or omission on the part of appellant, but, on the contrary, affirmatively establishes that the stowage of the deck cargo was proper and that the oil on the deck was the necessary result of the operation of the winches.

2. The deckload shifted through no fault of appellant.

In its findings of fact the Court found that the deckload was stowed in such a negligent manner that "it shifted, fell over and became uneven" (R. 10). The District Court thus in effect finds that because the deck cargo did shift it must be concluded that the appellant was negligent in its stowage.

In *Delaware R. R. Co. v. Koske,* 279 U. S. 7, the plaintiff proceeding under the Federal Employers Liability Act (which is incorporated by reference in the Jones Act), charged that he fell into a ditch near the track while alighting from a train. At page 10 of the report, the Court says:

> "The Employers Liability Act permits recovery on the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence. The burden was on the plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured and that in whole or in part his injuries resulted proximately therefrom."

The record in this case shows that the deck cargo was stowed in a customary, safe and seamanlike manner (R. 88, 98, 100). There were four chains passed under and over the deckload in addition to half inch steel cables, all of which were made fast by turnbuckles (R. 86). As shown by the log, the actual cause of the shifting of the deck cargo was the storm encountered by the vessel after it left San Francisco (R.

123, 124). Mr. Encell, the Second Mate of the vessel, testified in his deposition that this was the cause of the shifting (pp. 161, 162). This is not contradicted. There is no evidence that any other type of stowage would have prevented the shifting of the cargo. The force of the sea and waves was great enough to flatten the steel pipes on the after deck and to injure cargo in the hold (R. 123, 124). Naturally, it was heavy enough to shift the steel on the forward deck. Appellee's attempt to show that, if the deckload had been shored with wooden timbers, the shifting would not have occurred, failed to elicit any evidence in support thereof. The evidence which he was able to elicit from the witnesses was that it was either impossible or impractical to shore the deck cargo because the Mauna Lei was a flush deck type of vessel with no steel bulwarks (R. 87, 131-132). Moreover, there is no evidence that shoring would have prevented the shifting of the cargo in any event.

The evidence that the deckload shifted because of the action of the waves breaking over the deck was entirely disregarded by the lower Court and there is no evidence the shifting was caused by anything else. There is the suggestion in the record that the lashings were temporary (R. 22). There was no proof of what type of stowage would have been other than temporary; nor that temporary stowage was improper. There was no proof of what type of stowage would have been permanent or that permanent stowage was proper. Such a conclusion is not enough to constitute substantial evidence of negligent conduct on the part of appel-

lant. It establishes nothing in the way of proof of any negligent act or omission of appellant. It is purely a designation that could be applied to any type of stowage or any operation, for that matter.

In a sense, all stowage of cargo is temporary. The cargo does not become a part of the ship after stowage. It is meant to be removed at the end of the voyage. Since the force of the sea was enough to flatten steel pipe and injure cargo in the hold (R. 101), it is not surprising that it moved the deck cargo. Moreover, the evidence does not show that even with the shoring alluded to by counsel for appellee the result of the storm would have been any different. Appellant, under the Jones Act, was not required to guarantee that the deck cargo would not shift in a heavy storm or from other natural causes not under appellant's control. Appellant's sole duty was to load and stow the deck cargo in a manner which custom and practice among seafarers had shown was proper, adequate and safe. This appellant did. The District Court chose to believe Hansen's version of where the accident occurred as correct (see p. 9, supra). Assuming that the conflict of evidence as to where the accident happened has been resolved in favor of appellee, such evidence still fails to establish negligence on the part of appellant. If the surface of the deckload was rough and uneven, this was directly attributable to the storm and heavy seas through which the vessel had passed, not to the negligence of appellant.

The error of the Court was in concluding that since the accident had occurred on the deck cargo, the deck

cargo was an unsafe place to work and consequently appellant was negligent with respect thereto and responsible therefor. Such a finding constitutes appellant an insurer, because there is no finding, and no evidence upon which to base one, of what act or omission of appellant constituted the negligent stowage of cargo. The judgment makes appellant responsible for the shifting of the cargo and the resulting accident not because appellant negligently did or failed to do anything with respect to stowage, but because the cargo did in fact shift. The proposition is well established that a shipowner does not insure against the perils of navigation. A shipowner is responsible only when it is negligent and when that negligence proximately causes the injury.

Pittsburg SS. Co. v. Palo, (CCA 6th), 64 Fed. (2d) 198, 200, 1933 A.M.C. 1031;

Taylor v. Calmar SS. Co., (CCA 3rd), 92 Fed. (2d) 84, 86.

3. The oil on deckload was the necessary result of operation of the winches.

The Court admitted in evidence a photograph as Plaintiff's Exhibit No. 3, showing a certain amount of grease on the bed of the winch (R. 21, 22). The photograph does not show the scene of the accident nor the surrounding areas at the time of the accident. Hansen was not injured while working on the winch or about the winch (R. 34) but while he was some feet away on the deckload. The photograph was taken after the Mauna Lei had arrived at Honolulu and after the winch had been operated for several days (R. 50, 35).

The photograph did not show the condition of the deckload on January 15, 1941; nor did it show the condition of the deck around the winch on that day. The photograph did not show the place where Hansen claimed he was injured, and the place where the Court found he was injured.

The District Court found that there was a considerable amount of oil on the deck and that there was oil on the deckload (R. 10). On the day of the accident, there was no more oil than usual around the winch (R. 108). In fact, there was less than usual because the winches had not been used for six days and the deck had been washed clean by the action of the sea breaking over it several days before (R. 108). The oil was on the deck and not on the deckload, the top of which was variously described as being from four and one-half to six feet above the level of the deck (R. 94, 22). The only way oil could have gotten on the deckload itself was if Hansen had tracked it there or Hansen had the oil on his shoes at the time he was thrown from his feet.

According to his testimony, Hansen left his place by the mast house and crossed the deckload to the starboard rigging about eight to ten feet away (R. 30). He returned from the rigging over a different route and as he reached the inboard edge of the deckload he was thrown from his feet by the rolling of the vessel and fell (R. 47). It does not appear what effect, if any, the oil played in Hansen's fall. Assuming for the argument that the oil did contribute in part to Hansen's fall, the presence of oil where Hansen could pick it

up on his shoes and track it with him does not constitute negligent conduct on the part of appellant. The oil was the necessary result of the operation of the winches. The winches had to be greased and oiled preparatory to their use. So much seems to be admitted on all sides (R. 51). If Hansen got some of the oil on his feet, it was not the result of any failure or fault on the part of the shipowner to exercise reasonable care, but it was one of the normal risks aboard a vessel which is necessarily incident to the work of a seaman.

Miller v. Dollar Steamship Lines, 19 Cal. App. (2d) 206, 64 Pac. (2d) 1163.

THE ACTUAL CAUSE OF THE ACCIDENT WAS THE ROLLING OF THE VESSEL WHEREBY HANSEN WAS THROWN AGAINST A MOVING LINE.

A. SPECIFICATION OF ERROR INVOLVED.

No. 6.

The finding of fact of the District Court that due to the negligence of defendant plaintiff slipped and fell (R. 11) is erroneous in that it is unsupported by the evidence and contrary to the clear weight of evidence.

B. DISCUSSION.

Hansen testified that as he was proceeding over the deckload the vessel was rolling and he was thrown on the topping lift line, which at that instant began to move (R. 49). The line drew his hand into a block attached to the mast house and caused his injuries

(R. 26). The line was not moving before Hansen fell, but started to move at the exact instant his hand grasped it (R. 49). The entry in the log book made by Rosen, the Mate, stated that Hansen "got his left hand in the block when the ship took a roll" (R. 109). It thus appears that the efficient cause of the accident was the rolling of the vessel which caused Hansen to be thrown from his feet and accidentally place his hand upon the line which drew it into a block and caused his injuries.

Prior to starting the winches in motion Rosen, who was standing on the No. 1 hatch facing Hansen and the place where Hansen claims he fell, gave the order, in a loud voice, to "Heave away!" (R. 104), the boatswain then called out "All clear!" and started to operate the winches. (R. 104.) A second or so later Hansen was heard to cry out in pain when his hand was drawn into the block (R. 104). Hansen claimed he did not hear the warnings of Rosen and the boatswain (R. 48), although he was only from eight to ten feet from his assigned position at the mast house (R. 46). Mr. Encell, the Second Mate, who was on the bridge overlooking the operation, heard the warnings (R. 148).

Assuming Hansen's version of the accident to be the correct one, no reasonable person could anticipate that at the instant the winches were started after the repairs were made to the port rigging the vessel would "take a roll", Hansen would be thrown from his feet and his hand would fortuitously happen to land on a moving line and be drawn into a block.

Nor could any reasonable person anticipate that any similar injury would occur from the rolling of the ship, when the weather was clear and the sea was calm. This accident comes clearly within that class of accidents which often happen at sea and which are the fault of no one. As was said in the *Cricket* (CCA 9th), 71 Fed. (2d) 61, 1934 A.M.C. 1035, at page 63:

> "The life of a seaman is hard. The nature of his calling subjects him to many dangers. One of these is the hazards of a heavy sea. The sailor knows this and assumes the risks incidental to his calling. In Maloney, etc. v. U. S., 1928 A. M. C. 288, the deceased was struck by a heavy wave (the first to come on deck), which threw him down a stairway causing injuries from which he died. It was held that the accident was due to natural perils of navigation which Maloney assumed."

Hansen's fall and injury come within the category of those numerous happenings at sea which are purely fortuitous and could not be avoided by the exercising of reasonable care upon the part of the ship or its officers.

> *Hoeffner v. National SS. Co.* (CCA 9th), 1 Fed. (2d) 844.

The act of working on or about any deck cargo load carries with it certain risks of injury which cannot be avoided if the vessel is to be operated and carry out its functions. The Jones Act is not a workmen's compensation statute designed to compensate seamen for injuries arising out of and in the course

of employment. Congress has not seen fit to extend such legislation to seamen, perhaps because they receive the maritime benefits of maintenance and cure which were fully paid in this case (R. 11, 64). In fastening liability for Hansen's accident on appellant the District Court made appellant responsible for an accident which resulted from conditions outside its control. The District Court, in effect, found that appellant was liable for appellee's injuries because the injuries arose in the course of his work.

CONCLUSION.

Under the Federal Rules of Civil Procedure this Court has become a Court of review in cases tried at law without a jury, rather than solely a Court of error.

> Rule 52(a), *Fed. Rules of Civ. Procedure; Aetna Life Insurance Co. v. Kepler* (CCA 8th), 116 Fed. (2d) 1.

We submit that after resolving all conflicts of evidence in favor of appellee and after giving due regard to the opportunity of the District Court to judge the credibility of the witnesses, a review of the record shows that the findings of fact of the District Court are unsupported by substantial evidence and are clearly against the weight of evidence. There is no substantial evidence of any act or omission with respect to the stowage of the deck cargo on the Mauna Lei from which it can be inferred that appellant was negligent. On the contrary the evidence

affirmatively proves that the stowage of the deck cargo was done in a safe and seamanlike manner. The fact that the cargo shifted from the force of waves breaking over the deck is not evidence of improper stowage in the absence of affirmative facts showing wherein and in what respect such stowage was improper.

It is urged that the same principle is applicable to the matter of the oil on the deckload. There is no evidence that the oil caused appellee to fall; and even if there were, the clear weight of evidence is that some oil is the unavoidable result of greasing and oiling the winches preparatory to their use and is one of the dangers incidental to a seaman's employment. The finding of fact in the District Court in this respect is clearly against the weight of the evidence.

It is therefore respectfully submitted that the judgment should be reversed with direction to enter judgment for appellant.

Dated, San Francisco, California,
August 31, 1942.

HERMAN PHLEGER,
MAURICE E. HARRISON,
BROBECK, PHLEGER & HARRISON,
Attorneys for Appellant.

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No. 10,186

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

CHARLES HANSEN,
Appellee.

BRIEF FOR APPELLEE.

ANDERSEN & RESNER,
544 Market Street, San Francisco,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 10,186

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

CHARLES HANSEN,
Appellee.

BRIEF FOR APPELLEE.

BASIS OF ACTION.

The cause of action is that set forth in the "Statement of Pleadings and Facts Showing Jurisdiction" in the Opening Brief of Appellant. Briefly, the action was brought under the Jones Act for personal injuries sustained by Charles Hansen while employed as an able-bodied seaman on a vessel belonging to the defendant, Matson Navigation Company.

The cause was tried before the honorable A. F. St. Sure without a jury, and judgment was rendered for plaintiff. From this judgment in favor of plaintiff the defendant appeals.

STATEMENT OF FACTS.

The vessel, "Mauna Lei", owned by the defendant company, sailed from San Francisco to Honolulu. Hansen was an able-bodied seaman on the vessel. Before the vessel sailed a very large load of steel beams usually referred to as "I" beams or "H" Column was stored on the deck on both port and starboard sides. These beams were very heavy and were from 40 to 60 feet in length. The steel beams occupied practically all of the free space on the deck and no walkways were provided over the beams, and in order to walk either fore or aft it was necessary to walk inboard close to the hatches, combings and houses. The beams had not been shored (T. p. 66). By shoring, of course, is meant placing braces of either wood or steel against the object to be shored so that the beams could not spread, fall or tumble but would remain in place. Instead of shoring the beams two temporary lashes made of chain were placed around the beams (T. p. 66). On the first night out from San Francisco some sea was encountered and the beams fell over and were in effect strewn all over the deck. The photographs introduced in evidence will show the condition of these steel beams, the hatches of the vessel, the mast house, to which reference will be hereinafter made, and other deck details.

The steel beams remained in this very uneven condition from the time the vessel first encountered the sea until they reached Honolulu. The beams were so heavy and so long and there were so many of them that it was impossible to restack these beams so as to

put them in a safe condition (T. p. 66). On the day before the vessel arrived in Honolulu the Master decided to "top" the booms. By this is meant that the booms of the forward mast were to be raised to working position. These booms, while the vessel is at sea, are "cradled", that is, put out horizontally from the mast, the base, of course, resting on its pin in the mast, and the end of the boom resting in an iron collar or rest at the other end of the boom in order to keep the boom fast while not in use and to keep it from swaying or swinging in the event there is a sea. The Captain wished to top the booms or get them in working position in order to save time when the vessel arrived at Honolulu or at least to get the booms in shape for the unloading operations.

In this "topping" operation four or five men are used. The operation was under the supervision of the First Mate, a Mr. Rosen.

They started to top both the port and starboard forward booms at the same time. A winch is, of course, used in topping the booms, and this winch was operated by the Boatswain, Peter Lecht. Mr. Hansen, the plaintiff, was stationed on the starboard side of the vessel where he was to handle a guide line attached to the end of one of the booms for the purpose of steadying the boom as it was raised (T. p. 25). Mr. Hansen was standing at the side of the starboard forward mast house, the starboard mast rising from the top of the mast house at that point. The mast house and the mast will be shown on the pictures introduced in evidence. The cleat around which Mr.

Hansen was paying out the guide line was attached to this starboard mast house. The starboard winch was about four feet forward of the point where Hansen was stationed. The Boatswain was inboard of Mr. Hansen about five or seven feet forward and the Mate, Mr. Rosen, was on the center line of the ship on the Number One hatch or about twenty feet forward from Mr. Hansen and about fifteen or twenty feet forward of the Boatswain.

All hands were at their stations, and Mr. Rosen gave the order to heave away. The booms were raised about eight feet when one of the booms fouled on a line and both winches were stopped (T. p. 68).

In this topping operation a block, both port and starboard, was placed on the outboard rigging, and a line (cable) ran through the block on the rigging through another block on the starboard mast house as part of this operation. The block on the mast house is shown on the pictures in evidence.

When the booms were stopped on this first attempt to raise them, Mr. Lecht, the Boatswain (who, of course, is the superior officer of the plaintiff) told Hansen to take a small piece of line and put a stopper on the block which was attached to the outboard rigging (T. pp. 29-30-69). In other words, during this halt in the operation the Boatswain deemed it advisable to tie a piece of rope under the block on the rigging so that the block wouldn't slip from its position and cause a line to foul or other trouble. Hansen took a small piece of line and did as he was directed (T. p. 29). In doing this Hansen had to climb over

this deck load of steel to get to the block, the sea was rolling and there was "a lot of grease" and oil on the steel (T. p. 29). The steel was sticking out in all directions (T. p. 70), and there was oil all around the deck (T. p. 70), and there was a ground swell (T. p. 70).

In returning to his post from where he put the stopper on the block is when the accident occurred. Hansen had to walk over this very rough and uneven load of steel beams which had considerable oil on them and just before he reached his post they again started to raise the booms. As Hansen was nearing the inboard side of this pile of beams he slipped or stumbled. He involuntarily put his hand out and involuntarily grabbed the line that was running in the block on the mast house, and his hand was drawn into the sheave of the block, and his hand was badly mangled (T. p. 30).

FINDINGS OF FACT.

The Trial Court in its findings of fact found that the defendant company failed to provide the plaintiff with a safe place to work in that the steel beams were stored aboard the vessel in a negligent manner, that they were difficult and unsafe to walk upon and that there was oil in and about the place where plaintiff was working, and also on the steel beams over which plaintiff was required to work and walk.

The appellee attacks these findings both as to their support in the record and to their sufficiency as a matter of law to support the judgment.

ARGUMENT.

FACTS.

That the findings of the Trial Court are amply supported by the evidence has been proved by our references to the Transcript in which we have shown that this heavy deck load of steel was about five feet high (T. p. 94) and weighed about seventy tons (T. p. 95) and occupied all the available deck space (T. p. 90); was only held in place by temporary lashings and no attempt was made to shore it by means of either wood or steel shores (T. pp. 90-95). The steel beams fell out of place so that they presented a very uneven and dangerous (T. p. 29) place to walk. In addition to that, there was oil all around where Mr. Hansen was working as well as on the steel beams, presenting a constant slipping hazard.

The facts, therefore, as found by the Court and which go to make up the elements of negligence are clearly present. In other words, we have a ship in almost an unseaworthy condition where a capacity load of steel beams are stowed over all the available deck space with no walkways provided; where the beams shift due to improper lashings; where there is oil on them and where after the beams shifted no walkways were provided, and men are expected and ordered to walk over and upon these dangerous beams upon which there is a certain amount of oil, and as a result of this combination of factors the plaintiff slipped, caught his hand on a line and had it mangled. As stated above, the facts as found by the Court are amply supported by the evidence.

THE LAW.

The principal argument of the appellant is that under the Jones Act the facts as found do not provide a basis for an application of this Act to the facts of this case.

Under the Jones Act, which is to be liberally construed,

Torgerson v. Hutton (N.Y.), 1935 A.M.C. 195,

the failure of the steamship company to provide seamen with a safe place to work is clearly actionable, and any act of negligence on the part of the employer which proximately contributes to an injury sustained by a seaman renders the steamship company liable to an action for damages.

Cortes v. Baltimore Lines, 287 U. S. 367.

It is of course elementary that aboard ship that a seaman must at all times obey the commands of his superior officer such as a Boatswain and that he has no alternative but to obey.

Sanders v. South Atlantic Co., 1934 A.M.C. 1394.

The theory of the plaintiff in the trial of this case, which was sustained by the findings of fact, is that there were a combination of factors which put together constituted negligence on the part of the defendant company. These factors are

THE DECK CARGO OF STEEL BEAMS WAS IMPROPERLY STORED.

The steamship company, at its risk, chose to carry a capacity deck cargo of steel beams. These beams had very meager lashings, consisting of two *temporary* lashings, according to the testimony of the Boatswain, to which reference has heretofore been made, and four lashings according to the port captain employed by the company. In any event they were not shored, which would have been the proper way to stow the beams. It is true that the vessel encountered some rough weather but rough weather in January on the Pacific Ocean is something that is normally to be expected. If the defendant chose to stow this heavy load of beams on deck and in a manner a sea would cause them to spread all over the deck, that was the company's risk. Improper stowage of cargo on deck or in the hold which results in injuries is an element of negligence under the Jones Act.

Hansen v. U. S., 1933 A.M.C. 472;
Beadle v. Spencer, 298 U. S. 123;
Anelich v. "Arizona", 298 U. S. 110.

PERMITTING OIL ON DECK IS NEGLIGENCE.

2. An element of negligence is permitting oil or other slippery substances to remain where seamen are expected or ordered to work. That this is an element of negligence under the Jones Act, we believe, is evident. The testimony to which reference has been made is that there was a great deal of oil on the deck im-

mediately forward of where the plaintiff was working and in addition to that there was oil on these beams over which plaintiff had to walk in putting the stopper on the block as he was directed to do by the Boatswain. The following cases support this statement:

Becker Steamship Co. v. Snyder, 166 N. E. (Ohio) 645;

Sanders v. South Atlantic Co., 1934 A.M.C. 1394;

Sandberg v. U. S. A., 1936 A.M.C. 1281.

APPELLANT COMPANY HAD DUTY TO SUPPLY PLAINTIFF WITH SAFE PLACE TO WORK.

3. Under the Jones Act the defendant steamship companies must at all times supply the seaman with a safe place to work.

Hansen v. Luckenbach Steamship Co., 1933 A.M.C. 764.

"A seaman assumes the risks normally incident to his calling, *but not that of negligent failure to provide a seaworthy ship and safe appliances.*"

"Arizona" v. Anelich, 298 U. S. 110.

Seamen do not assume the risk of an unsafe place to work.

Reylem v. S. P. Co., 1937 A.M.C. 137;

Beadle v. Spencer, 298 U. S. 124.

CONCLUSION.

We therefore respectfully submit that the findings of the Court are amply supported by the record and that these findings support a cause of action under the Jones Act. The defendant steamship company chose at its peril to load a large and heavy deck load occupying all of the deck space. This deck load was so insecurely lashed that it fell apart and spread all over the deck; between the time that it was spread all over the deck and the four days it took to get to Honolulu no walkways were provided over the steel, which was in a very rough, uneven and dangerous condition, requiring people to walk on the edges of the steel. No lines or anything else were provided for the safety of the crew. In addition to that, oil was on the deck and on the steel, making it additionally hazardous to the seamen called upon to work in, on and around this deck load. These factors in our opinion and as found by the trial Court were amply sufficient to sustain the judgment entered herein.

We respectfully suggest therefore that the judgment should be affirmed.

Dated, San Francisco,
October 9, 1942.

ANDERSEN & RESNER,
Attorneys for Appellee.

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No. 10,186

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

CHARLES HANSEN,
Appellee.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 10,186

IN THE

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For the Ninth Circuit

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CHARLES HANSEN,
Appellee.

APPELLANT'S REPLY BRIEF.

THE FACTS.

Appellee's statement of facts fails to contain citations to the record for many of the matters asserted therein. (Brief for Appellee, pp. 2-5.) Appellee asserts, on page 2 of his brief, that "on the first night out from San Francisco some sea was encountered and the beams fell over and were in effect strewn all over the deck". There is no citation to the record in support of this statement. The record shows that the steel moved or shifted as the result of heavy seas. (R. 100, 101.)* The photographs referred to (Brief for Appellee, p. 2) do not show the condition of the deck at

*The record is referred to throughout this brief by the designation "R.".

the time of the accident but several days later, after part of the deck cargo had been removed. (R. 21.)

Appellee also states that the "Captain wished to top the booms or get them in working position in order to save time when the vessel arrived at Honolulu". (Brief for Appellee, p. 3.) We find nothing in the record to support this statement. The record does show that the procedure of topping booms a day out of port is usual and customary on all ships. (R. 142, 158.) Reference is also made to four or five men used in the topping operation. (Brief for Appellee, p. 3.) The record shows that the entire crew, except the helmsman and second officer, was engaged in this operation. (R. 102, 142.) Appellee also states (Brief for Appellee, p. 2) that the steel beams were so heavy and so long and there were so many of them that it was impossible to restack them so as to put them in a safe condition. The record (R. 66) merely shows that it was impossible to restack them, because the material was too heavy (R. 162) for the ship's gear.

THERE IS NO PROOF OF NEGLIGENCE ON THE PART OF APPELLANT.

The Jones Act afforded seamen a modified common law remedy for negligence and the assumption of risk defense was much weakened. This proposition is well established. (See Appellant's Opening Brief, pp. 16, 17; *De Zon v. American President Lines* (C. C. A. 9th), 129 Fed. (2d) 404, 407.) But the seaman fails to make out a case under the Jones Act when there is no evidence of negligence and the only evidence is that

his injuries resulted from conditions which were not the fault of the shipowner or which were normally incident to his calling as a seaman. This statement is illustrated by the quotation from *Arizona v. Anelich* (298 U. S. 110), found at page 9 of appellee's brief. Those matters which appellee denotes as negligent acts arose not as the result of negligent failure by appellant but from conditions outside its control. The oil on the deck resulted from the operation of the winches which had to be greased and oiled preparatory to use. (R. 70.) Negligence cannot be predicated upon a condition which is the necessary result of the operation of the ship's gear.

Appellee also complains of the stowage of the deck cargo because it was not shored (Appellee's Brief, p. 8), but he is unable to cite any evidence in the record showing that the deck cargo should have been shored or that it would have been good seamanship to shore the deck cargo. This unproved assertion by appellee was affirmatively disproven by the evidence that shoring was impossible or impractical. (Appellant's Opening Brief, p. 19; R. 87, 131-132.)

In *Hansen v. U. S.* (U. S. District Court), 1933 A. M. C. 472 (Appellee's Brief, p. 8), the plaintiff was injured when a jumbled pile of logs fell upon him during loading operations. The evidence showed that the stowing did not take place in accordance with usual custom. There is no such evidence in this case. In fact, the evidence affirmatively shows that the stowage did take place in accordance with usual custom and in a safe and seamanlike manner. (R. 100, 88; Appellant's Opening Brief, p. 6.)

In *Arizona v. Anelich,* 298 U. S. 110, also cited by appellee, the Court held that a steamship company was liable for negligently furnishing a seaman with defective equipment. The Supreme Court did not review (pp. 117, 118) the question of the negligent failure to furnish equipment, but considered the defense of assumption of risk under the Jones Act.

In *Beadle v. Spencer,* 298 U. S. 124, cited by appellee, the Supreme Court of the United States held that assumption of risk was not a defense in an action under the Jones Act for injuries resulting from negligently piled lumber. (p. 128.) The report of the Supreme Court of California in that case (4 Cal. (2d) 313, 48 Pac. (2d) 678) shows that the lumber had been "landed" on the deck rather than stowed as was customary, and had not been piled upon lathes or dunnage in order to make it solid. There was also evidence that the hatch into which the plaintiff fell should not have been opened and that it was unusual and uncustomary to load the deck so close to the hatch. In the instant case, the record shows that the steel was loaded on four inches of dunnage. (R. 85.)

Appellee endeavors to support the judgment on the ground that the Jones Act is to be liberally construed. This court has recently held that liberal construction does not dispense with the necessity of proof of negligence. In *De Zon v. American President Lines* (C. C. A. 9th, July 3, 1942), 129 Fed. (2d) 404, this court at pages 407 and 408 says:

> "We are reminded by plaintiff that this act 'is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to

> those dependent on his earnings' (Cortes v. Baltimore Insular Line, supra, 287 U. S. 367, 375, 53 S. Ct. 173, 176, 77 L. Ed. 368), but we must also be mindful of the fact that although the Jones Act has given 'a cause of action to the seaman who has suffered personal injury through the negligence of his employer' (287 U. S. 372, 53 S. Ct. 174, 77 L. Ed. 368), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty. 'A seaman is not entitled to compensation or indemnity in the way of consequential damages for disabilities or effects occasioned by the sickness or injury, except in case of negligence.' 24 R. C. L. Sec. 218, p. 1164."

Appellant in the instant case has not claimed that proof of negligent stowage of deck cargo which proximately results in injury to a seaman will not result in a cause of action under the Jones Act. Appellant contends there is no evidence whatsoever of negligent stowage of deck cargo, and on the contrary the evidence affirmatively shows that the deck cargo was properly stowed in a customary and seamanlike manner. (Appellant's Opening Brief, pp. 18-21.) The error of the District Court was in concluding that since the deck cargo did shift from the force of the sea it had been negligently or improperly stowed. Such a conclusion is unwarranted in the face of evidence of proper stowage and in the absence of evidence of wherein the stowage was improper. Moreover, in the instant case not only was the stowage conducted in the customary and usual manner but the booms were topped in accordance with usual practice. There was

no evidence that it was customary to place walkways over the deckload or that such walkways would have been possible of construction. Where the use of such appliances is neither customary nor practical, the failure to furnish them is not negligence.

Red River Line v. Smith (C. C. A. 5th), 39 C. C. A. 620, 99 Fed. 520;

Adams v. Bortz (C. C. A. 2d), 279 Fed. 521, 526.

CONCLUSION.

As we urged in our opening brief, the question presented by this appeal is whether there is substantial evidence to support the finding of negligence on the part of appellant. Evidence of an accident is not proof of negligence. A seaman's life by its nature is a hazardous one and accidents through the fault of no one are particularly liable to occur. (*The Iroquois,* 194 U. S. 240, 243, 24 S. Ct. 654, 48 L. Ed. 953.) Appellant submits that the evidence in this case fails to establish any lack of care or conduct inconsistent with safe and seamanlike practices.

It is, therefore, respectfully urged that the judgment of the District Court be reversed.

Dated, San Francisco, California,
October 17, 1942.

HERMAN PHLEGER,
MAURICE E. HARRISON,
BROBECK, PHLEGER & HARRISON,
Attorneys for Appellant.

No. 10204

United States

Circuit Court of Appeals

For the Ninth Circuit.

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals

ROTARY COLORPRINT. 590 FOLSOM ST., SAN FRANCISCO

No. 10204

United States

Circuit Court of Appeals

For the Ninth Circuit.

CLAUDE R. FOOSHE,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

JOHN L. WHEELER, Esq.,

For Comm'r.:

FRANK T. HORNER, Esq.,

Docket No. 106640

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1941

Mar. 11—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 11—Copy of petition served on General Counsel.

Apr. 2—Answer filed by General Counsel.

Apr. 2—Request for hearing in Los Angeles filed by General Counsel.

Apr. 4—Notice issued placing proceeding on Los Angeles, Calif. calendar. Service of answer and request made.

1941

Apr. 14—Notice of appearance of John L. Wheeler as counsel for taxpayer filed.

Sept. 6—Request for hearing in Los Angeles Sept. 22, 1941 filed by taxpayer.

Sept. 6—Request granted.

Sept. 6—Hearing set 9/22/41 at Los Angeles, Calif.

Oct. 1—Hearing had before Mr. Disney on the merits. Submitted. Stipulation of facts filed. Briefs due 11/15/41 — replies 11/30/41.

Oct. 15—Transcript of hearing of 11/1/41 filed.

Nov. 7—Brief filed by General Counsel.

Nov. 17—Brief filed by taxpayer. 11/17/41 copy served.

Dec. 5—Order extending time to Dec. 4, 1941 to file reply brief entered.

Dec. 4—Reply brief filed by taxpayer. 12/8/41 copy served.

Dec. 9—Supplemental stipulation of facts filed.

1942

Jan. 27—Findings of fact and opinion rendered, Disney. Decision will be entered for the respondent. 1/28/42 copy served.

Jan. 28—Decision entered, Disney, Div. 4.

Apr. 23—Petition for review by U. S. Circuit Court

1942

of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Apr. 23—Proof of service of petition for review filed.

May 6—Praecipe for record filed by taxpayer with affidavit of service by mail attached.

Jul. 10—Order extending time to July 31, 1942 for transmission and delivery of record entered. [1*]

United States Board of Tax Appeals
Docket No. 106640

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby appeals from the determination of the respondent set forth in his deficiency letter dated February 8th, 1941, symbols LA:IT:90D:PB, and as a basis of this proceeding alleges as follows:

I.

Petitioner is a citizen of the United States of

*Page numbering appearing at top of page of original certified Transcript of Record.

America and now resides at 2047 San Pasqual Avenue, Pasadena, California.

II.

The deficiency letter, copy of which is attached hereto and marked "Exhibit A", was mailed to the petitioner on or about February 8th, 1941.

III.

The taxes in controversy are for the calendar year 1938, and amount to the sum of $1,436.37.

IV.

The determination of taxes set forth in said deficiency letter is based upon the following error:

1. Commissions received from the Prudential Insurance Company in the amount of $21,504.80, which formed a part of the compensation received by petitioner as manager of Ordinary Agency "A" of the Prudential [2] Insurance Company in Los Angeles, California, was held to be the separate property of the petitioner. This ruling was erroneous as this income was community income and property under Section 161 A of the Civil Code of California, and as such belonged to petitioner and his wife, Lura D. Fooshe, in equal portions. Thus, the sum of $10,752.40 was the income of the petitioner and properly reported on his return. Likewise, the same amount was income of Lura D. Fooshe and was properly reported on her return.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

1. On May 1st, 1938, petitioner became manager of Ordinary Agency "A" of the Prudential Insurance Company in Los Angeles, California. Prior to that time petitioner had been manager of the Ordinary Agency in St. Louis, Missouri. While acting as manager of the St. Louis Agency, petitioner's duties and compensation were determined by a standard form manager's contract, designated as an "old terms contract", entered into between the Prudential Insurance Company and petitioner.

Upon becoming manager of the Los Angeles Ordinary Agency "A", the contract which had been in effect as to the St. Louis Ordinary Agency was cancelled and a new agreement was made. Under the provisions of this new agreement, the total compensation to be received by petitioner as manager of the Los Angeles Ordinary Agency "A" was based in part upon a standard form contract designated as a "new terms contract" [3] and in part by an agreement under which the Prudential Insurance Company waived its collection fee of 2% on certain business in force in St. Louis and paid the sums realized by reason of this waiver to petitioner as a part of his compensation as manager of the Los Angeles Agency.

This method of determining the total com-

pensation to be received by petitioner as manager of the Los Angeles Ordinary Agency "A" was employed because of:

(a) The long experience and ability of the petitioner in building and managing such Ordinary offices:

(b) The amount of insurance written and in force was much greater in the St. Louis Ordinary Agency than in the Los Angeles Ordinary Agency "A": and

(c) The changes made in the basis of determining the compensation of the manager of an Ordinary Agency under the contract in force when petitioner was manager of the St. Louis Ordinary Agency and that which the company employed when petitioner became manager of the Los Angeles Ordinary Agency "A".

The particular form of agreement was employed because it was the most flexible and satisfactory from the standpoint of the two contracting parties.

Under this agreement between the Prudential Insurance Company and the petitioner as manager of the Los Angeles Ordinary Agency "A", petitioner received $21,504.80 in 1938 by reason of the waiver by the [4] *by the* Prudential Insurance Company of its collection fee on certain business in force in the St. Louis Ordinary Agency. This amount being received as compensation for services performed as man-

ager of the Los Angeles Ordinary Agency "A", was community property within the purview of Section 161 A of the Civil Code of California, and as such, one-half of this amount was reported by petitioner on his return for the year 1938 and one-half thereof was reported on the return of petitioner's wife, Lura D. Fooshe.

Wherefore, petitioner prays that the Board hear this petition and order a refund of $1,436.37, or such other sum as is meet and proper in the premises.

JOHN L. WHEELER
Counsel for Petitioner

(Duly verified.) [5]

EXHIBIT "A"

TREASURY DEPARTMENT
Internal Revenue Service
Twelfth Floor
U. S. Post Office and Court House
Los Angeles, California
Feb. 8, 1941

Los Angeles Division
LA:IT:90D:PB

Mr. Claude R. Fooshe
4166 Woodleigh Lane
Pasadena, California

Sir:

You are advised that the determination of your income tax liability for the taxable year ended De-

cember 31, 1938 discloses a deficiency of $1,436.47, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner
by
(Sgd) GEORGE D. MARTIN
Internal Revenue Agent in
Charge

Enclosures:
Statement.
Form of Waiver [6]

LA:IT:90B:PB

Mr. Claude R. Fooshe,
4166 Woodleigh Lane
Pasadena, California

TAX LIABILITY FOR THE TAXABLE YEAR ENDED DECEMBER 31, 1938

	Liability	Assessed	Deficiency
Income Tax	$2,199.34	$ 762.87	$1,436.47

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 9, 1940; to your protest dated March 6, 1940; and to the statements made at the conferences held on March 22, May 17 and August 8, 1940.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition the United States Board of Tax Appeals for a redetermination of the deficiency.

A copy of this letter and statement has been mailed to your representative, Mr. John L. Wheeler, 1240 Pacific Mutual Building, 523 West Sixth Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$10,970.48
Additional income and unallowable deductions:	$10,752.40	
(a) Commissions received		
(b) Depreciation disallowed	47.22	
(c) Net Long-term capital loss disallowed	1,780.10	12,579.72
Net income adjusted		$23,550.20

[7]

Mr. Claude R. Fooshe — Statement

Explanation of Adjustments

(a) Terminal commissions in the amount of $21,504.80, received from Prudential Life Insurance Company on insurance written while you were Agency Manager at St. Louis, Missouri, are held to be your separate property. This income did not constitute community property within the purview of section 161(a) of the Civil Code of California. Since you included in your return only $10,752.40 of this amount, your income is increased $10,752.40.

(b) The amount of depreciation allowable under the provisions of section 23(l) of the Revenue Act of 1938 on Essex Avenue property is $150.00. Since you claimed $197.22 as depreciation on this property, the amount of $47.22 is disallowed.

(c) The loss of $1,000.00 claimed in your return on account of worthlessness of $2,000.00 convertible debenture "A" 6's of 1933 of East Coast Utilities Company is disallowed because the bonds were not ascertained to be worthless within the taxable year, within the meaning of section 23 (k) of the Revenue Act of 1938.

The following losses claimed on account of securities becoming worthless are disallowed because the securities did not become worthless during the taxable year, hence the losses claimed were not sustained during the taxable year and are not deductible.

Security	Loss Claimed
Stock of Franklin American Trust Company (St. Louis, Missouri)	$ 300.00
Stock of Penco Realty Company	120.00
Total	$ 420.00

In lieu of the losses totaling $467.20, claimed with respect to the sale of 10 shares of 6 per cent preferred stock, and 42 shares of common stock of American Utility Service Corporation, the following loss is determined, resulting in the disallowance of $233.10;

Sale price of above stocks, total	$ 31.80
Cost (bond purchased in 1923, exchanged for above stocks)	500.00
Loss sustained	$ 468.20
Deductible loss, 50% (section 117, Revenue Act of 1938)	$ 234.10

[8]

Mr. Claude R. Fooshe Statement

The realized profit of $298.00 from the sale of two horses is not subject to the limitation provided in section 117 of the Revenue Act of 1938, because the horses were not capital assets as defined in that section. The gain of $149.00, included in your return, is, therefore, increased $149.00.

Due to mathematical errors, the net long-term

capital loss is understated in your return $22.00.

The above adjustments result in a net decrease in net long-term capital loss of $1,780.10.

COMPUTATION OF TAX

Net income adjusted		$23,550.20
Less:		
Personal exemption		2,500.00
Balance (surtax net income)		21,050.20
Less:		
Earned income credit (10% of $14,000.00)		1,400.00
Net income subject to normal tax		19,650.20
Normal tax at 4% on $19,650.20	$ 786.01	
21,050.20	1,417.53	
Total tax		2,203.54
Less: Income tax paid at the source		4.20
Correct income tax liability		2,199.34
Income tax assessed:		
Original, account No. 205520		762.87
Deficiency of income tax		1,436.47

[Endorsed]: U.S.B.T.A. Filed Mar. 11, 1941. [9]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows: [10]

I. and II.

Admits the allegations contained in paragraphs I. and II. of the petition.

III.

Denies so much of paragraph III. of the petition as alleges that the amount in controversy is $1,436.37; admits all other allegations therein contained.

IV.

Denies the allegations of error contained in paragraph IV. of the petition. [10]

V.

Admits so much of paragraph V. of the petition as alleges that on May 1, 1938, the petitioner became manager of Ordinary Agency "A" of the Prudential Insurance Company in Los Angeles, California; that prior to that time the petitioner had been manager of the Ordinary Agency in St. Louis, Missouri; that while acting as manager of the St. Louis Agency the petitioner's duties and compensation were determined by a contract entered into between the Prudential Insurance Company and the petitioner, and denies all other allegations therein contained.

VI.

Denies each and every allegation contained in the

petition not hereinbefore specifically admitted or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL
FTH
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
Division Counsel.
FRANK T. HORNER,
Special Attorney,
Bureau of Internal Revenue.
FTH/fmt 3/28/41

[Endorsed]: U.S.B.T.A. Filed Apr. 2, 1941. [11]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties to the above-entitled case, through their respective counsel, as follows:

1. The petitioner is at present, and has been since about the first of May, 1938, manager of an ordinary agency, at Los Angeles, California, of the Prudential Insurance Company of Newark, New Jersey, under certain agreements in this stipulation mentioned, entered into by and between the said Pru-

dential Insurance Company and the petitioner. Under date of April 25, 1938, a contract was entered into by and between the petitioner and the said company, effective on or about May 1, 1938. A copy of this contract is attached as Exhibit A, and may be received in evidence.

2. On or about August 4, 1919, the Prudential Insurance Company and the petitioner entered into a contract with respect to his services as manager of an ordinary agency at St. Louis, Missouri. A copy of this contract is attached as Exhibit B, and may be received in evidence. [12]

3. On or about May 17, 1927, the contract of August 4, 1919 (Exhibit B, paragraph 2 hereof), was amended. A copy of this amendment is attached hereto as Exhibit C, and may be received in evidence.

4. In order to provide some inducement to the petitioner to relinquish his position in St. Louis, Missouri, and assume the management of an ordinary agency in Los Angeles, California, it was agreed that the petitioner would be paid the full terminal commissions on renewal premiums under the contract of 1919 (Exhibit B, paragraph 2 hereof) without deduction by the said insurance company of the collection fee of two percent. No formal written agreement, in the form of a contract, was executed by the parties. However, the agreement just referred to was expressed in a letter written by the petitioner at St. Louis, Missouri, under date of February 23, 1938, and addressed to the Pru-

dential Insurance Company, a copy of which is attached hereto as Exhibit D, and may be received in evidence.

5. In a letter dated February 24, 1938, the Prudential Insurance Company replied to the petitioner's letter (Exhibit D, above), confirming the understanding of the petitioner as expressed in the above-mentioned letter (Exhibit D). A copy of the said reply is attached hereto as Exhibit E, and may be received in evidence.

6. On March 14, 1938, the Prudential Insurance Company addressed the petitioner, a copy of which communication is attached hereto as Exhibit F, and may be received in evidence. [13]

7. Pursuant to the agreements and contracts referred to in this stipulation, the petitioner came to California from St. Louis, Missouri, on or about May 1, 1938, to perform the services in Los Angeles, California, provided for under the said agreements and contracts.

8. Prior to May 1, 1938, the petitioner was the St. Louis, Missouri, manager of an ordinary agency of the Prudential Insurance Company of Newark, New Jersey, under a contract executed in 1919 and amended in 1927 (Exhibits B and C).

9. Between the time of the petitioner's arrival in Los Angeles, California, on or about May 1, 1938, to assume his new duties, and the end of the taxable year 1938, which year is involved in this proceeding,

the petitioner received from the Prudential Insurance Company of Newark, New Jersey, the sum of $21,504.80, all of which has been included by the respondent in the taxable income of the petitioner for 1938. This sum of money represented the equivalent of two and one-half per cent of the premiums collected in the said St. Louis ordinary agency after April 30, 1938, and paid by policyholders on policies issued while the petitioner was manager of the ordinary agency of the said insurance company at St. Louis, Missouri, under the contracts herein mentioned (Exhibits B and C).

10. At the close of business December 31, 1937, there was in force in the ordinary agency at St. Louis, Missouri, in the territory [14] of which the petitioner had charge, $49,122,406.00 of life insurance issued by the Prudential Insurance Company, of which amount the sum of $5,153,004.00 represented new life insurance written under the supervision of this petitioner during the year 1937.

11. At the close of business December 31, 1937, the territory in Los Angeles, California, to which the Prudential Insurance Company later transferred the petitioner as a manager of an ordinary agency, had in force life insurance issued by the Prudential Insurance Company in the amount of $29,077,437.00, of which amount $846,237.00 represented new life insurance issued in said Los Angeles territory during the year 1937.

12. In 1938, the standard form of ordinary man-

ager's contracts used by the Prudential Insurance Company was different from that in use in 1919. Acceptance by the petitioner in this case of the Los Angeles managership of an ordinary agency, solely on the basis of the said standard new form of contract in use in 1938, and without any change in the 1919 contract (Exhibits B and C), would have resulted in a substantial decrease in the petitioner's compensation immediately after his arrival in Los Angeles, California, because of the fact that less life insurance was in effect in said Los Angeles agency than had been in effect in St. Louis, and, also, on the basis of the new life insurance issued in 1937 in said Los Angeles agency, [15] the said new insurance to be issued in the following year (1938) would probably have been less than had been written during the last year (1937) of Mr. Fooshe's managership in St. Louis, Missouri.

13. In response to a request of the petitioner for information as to the reason for the termination, by the Prudential Insurance Company, of his St. Louis, Missouri, contract of 1919 (Exhibit B), the Prudential Insurance Company advised Mr. Fooshe, the petitioner, under date of April 17, 1940, a copy of which communication is attached hereto as Exhibit G, and may be received in evidence.

14. If the Prudential Insurance Company had not waived its right to deduct the collection fee of two per cent from the terminal commissions payable to the petitioner under the St. Louis ordinary man-

agership contract of 1919, after Mr. Fooshe assumed the new position in Los Angeles, California, the petitioner would still have been entitled to the net amount representing one-half per cent of the renewal premiums collected by the said St. Louis office, of which the petitioner was manager until about the first of May, 1938.

15. The contract between the Prudential Insurance Company and the petitioner, which was executed on August 4, 1919 (Exhibit B, paragraph 2 hereof), provided for the payment by the Prudential Insurance Company to its manager the commissions specified therein of the renewal premiums on insurance policies issued, of which percentage [16] the manager of the ordinary agency, in this case the petitioner, was entitled to receive personally and retain for his personal use only two and one-half per cent, the balance being paid to the particular agent writing the insurance. While the amount to be retained by the manager varies in certain instances, yet for the purposes of this particular case, the parties agree that the Board may accept as a fact, as a basis for its consideration and determination of the issue in this case, that the petitioner's commissions on the collection of premiums on the policies written under his supervision while manager at St. Louis, amounted to two and one-half per cent.

16. The return of the petitioner for the year 1938 was filed with the United States Collector of Internal Revenue at Los Angeles, California.

17. Attached is a copy of an affidavit of George H. Chace, executed October 25, 1940, marked Exhibit H, and may be received in evidence.

(Sgd) JOHN L. WHEELER
Counsel for Petitioner.

(Signed) J. P. WENCHEL
FTH
Chief Counsel,
Bureau of Internal Revenue.
Counsel for Respondent.

[Endorsed]: U.S.B.T.A. Filed Oct. 1, 1941. [17]

EXHIBIT A

This Contract, made this 25th day of April, 1938, by and between The Prudential Insurance Company of America, of Newark, N. J., hereinafter designated as the Company, and Claude R. Fooshe of St. Louis in the State of Missouri, hereinafter designated as the Manager,

Witnesseth: That the said Company and Manager, in consideration of the sum of one dollar each to the other in hand paid, and of the covenants and agreements hereinafter specified, hereby mutually covenant and agree, each with the other, as follows, to wit:

Section 1.—That the Company does hereby appoint the above named as Manager of the Los Angeles "A", California, Ordinary Agency covering the following territory: In Inyo, Kings, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Luis

Obispo, Santa Barbara, Tulare and Ventura counties. to obtain, supervise and instruct Agents for the Company in the territory named, to procure applications for insurance and annuities exclusive of Industrial, Monthly Debit Ordinary and Intermediate Monthly Premium Industrial insurance in the said Company and to collect and pay over the premiums and considerations thereon to the Company in cash on such insurance and annuities when effected, and to perform such other duties in connection therewith as may be required by the Company.

Section 2.—That the Manager shall devote his entire time and energies to the business of the Company, promote its success and welfare, and be governed by the written and printed instructions and rules which he may from time to time receive from the Company.

Section 3.—That the Manager shall keep correct accounts in the books provided by the Company of all business done and moneys collected; that all books, accounts, documents, vouchers and other papers connected with the business of the Company are and shall be its property and at any time open to inspection and examination by its authorized representative; and that the Manager shall render when required, on the forms provided by the Company, a true account of all moneys received by him on behalf of the Company.

Section 4.—That all moneys received or collected by the Manager for or on behalf of the Company, after making such deductions as are authorized by

the Company, shall be held by the Manager in trust for the Company, and shall not be used by him for any purpose whatsoever, except as specially authorized by the Company, but shall be immediately deposited to the credit of The Prudential Insurance Company of America in a bank designated by the Company, or shall be paid over to such person as the Company may designate.

Section 5.—That the Manager shall not incur or authorize the incurring of any expense on account of the Company, without written authority.

Section 6.—That the Manager shall not issue or distribute or authorize the issuance or distribution of any circulars or papers, or write or send any communication to or insert any advertisement in any publication in any way relating to this or any other life insurance company or society without written authority from the Company; or use or authorize the use of language, orally or in writing, or commit or authorize the committing of any act tending to bring this or any other company or society into disrepute.

Section 7.—That the Manager shall have no authority on behalf of the Company to make, alter or discharge any policy or Annuity contract, to extend the time for paying a premium or a consideration, to waive forfeitures, to incur any liability on behalf of the Company or to allow the delivery of any policy unless the applicant be in good health and the first premium paid in full or to allow the delivery of any Annuity contract unless the initial premium or consideration is paid in full.

Section 8.—That the Manager shall have no authority on behalf of the Company to enter into any contract or agreement with Agents or Brokers and all contracts and agreements with Agents or Brokers shall be valid only when signed by the President, one of the Vice Presidents, the Secretary or an Assistant Secretary of the Company.

Section 9.—That the Company shall have the right to make changes in its method of conducting business, to divide the territory set forth in Section 1 hereof and to make other appointments in such territory, as from time to time may seem to the Company to be desirable.

Section 10.—That in consideration of the services herein described being performed and this contract being fulfilled by the Manager upon the terms and conditions herein stated, he shall receive a guaranty salary at the rate of $600.00 per month.

Section 11.—That in addition the Manager shall receive:

(a) As an over-riding commission a sum equal to five per cent. (5%) of all first-year commissions paid by the Company to Agents or Brokers in accordance with their individual contracts with the Company on business written while operating through his Agency, and of the first-year commissions paid to the Manager in accordance with Section 13 hereof, except that in the event of the transfer to or from the Agency of any policy or contract the Company shall have the right to adjust the said

over-riding commission, or pay no over-riding commission on the business so transferred, as the Company may decide; and,

(b) As an over-riding commission in addition to the compensation specified in Section 11 (a) hereof, a sum equal to fifteen per cent. (15%) of the first-year commissions paid by the Company to Agents or Brokers in accordance with their individual contracts with the Company on considerations paid on account of Group Annuity contracts written by such Agents or Brokers while operating through his Agency, except that in the event of the transfer to or from the Agency of any such Group Annuity contracts the Company shall have the right to adjust the said over-riding commission, or pay no over-riding commission on the Group Annuity contracts so transferred, as the Company may decide; and,

(c) As an over-riding commission in addition to the compensation specified in Section 11 (a) hereof, a sum equal to one-half of one per cent. (½ of 1%) of the purchase price of Single-Payment Annuities written by the Manager personally or by Agents or Brokers while operating through his Agency.

Section 12.—That the Manager, until further notice, shall receive an additional compensation, payable monthly, which shall be determined as follows: The Manager shall be credited with the amount of life insurance (excluding all Group and Wholesale policies) and *Retirement Annuities issued and paid for or revived to the credit of said Agency; from

this credit shall be deducted the amount of life insurance (other than Group and Wholesale policies) and *Retirement Annuities in force in said Agency which become lapsed or canceled because of the discontinuance for any reason of premium payments to the Company before completion of the premium-paying period provided in the policies or contracts, including all policies and contracts surrendered for cash or which are effective only under their non-forfeiture provisions and policies and contracts transferred from the said Agency which become lapsed or canceled for any reason before the payment of the full first-year premiums has been completed, excluding from the computations of the amounts charged to the Manager, cancelations upon death, disability claims, matured endowments, policies and contracts becoming fully paid up by premium payments or by dividend accumulations and Term policies expired; upon the remainder the Manager shall receive one dollar ($1.00) for each one thousand dollars ($1000) of such amount, but if the charges exceed the credits, the difference shall be charged to the Manager and the Manager shall be required to offset such net charges before receiving any further compensation under this Section.

*The amount to be credited or deducted on account of Retirement Annuity contracts in computing the compensation to be paid in accordance with the above Section shall be an amount as determined by the Company for each $100.00 Annual Premium Unit, based upon the number of Annual Premiums called for in the Retirement Annuity contract. [18]

Section 13.—That, with respect to the business procured by the Manager personally, he shall receive, during the continuance of this contract, commissions on premiums and considerations collected by him on such business and paid to the Company in cash, at the rates and for the periods set forth in the following tables (except in the cases of policies issued as a result of the conversion of Group Life insurance certificates or Wholesale policies in connection with which cases no commissions will be paid, and except in the particular instances involving certain monthly premiums as hereinafter set forth); and provided that commissions on premiums or considerations discounted and paid in advance shall be allowed the Manager only on the due dates of such premiums or considerations.

Kind of Policy	Per Cent. of Premiums: First Policy Year	Per Cent. of Premiums: Second to Tenth Policy Year Inclusive
Modified Life 3	50	5
Modified 3-20	50	5
30-Payment Life	50	5
25-Payment Life	45	5
20-Payment Life	45	5
15-Payment Life	40	5
10-Payment Life	35	5
5-Payment Life	20	5
33-Year or Longer, Endowment	50	5
28-Year to 32-Year Endowment	45	5
23-Year to 27-Year Endowment	40	5
20-Year to 22-Year Endowment	35	5
18-Year to 19-Year Endowment	35	3
13-Year to 17-Year Endowment	25	3
8-Year to 12-Year Endowment	20	3
5-Year to 7-Year Endowment	10	3

Kind of Policy	Per Cent. of Premiums: First Policy Year	Per Cent. of Premiums: Second to Tenth Policy Year Inclusive
20-Payment 30-Year Endowment	40	5
15-Payment 30-Year Endowment	40	3
15-Payment 25-Year Endowment	35	3
15-Payment 20-Year Endowment	30	3
10-Payment 25-Year Endowment	30	3
10-Payment 20-Year Endowment	30	3
10-Payment 15-Year Endowment	25	3
20-Payment Life with Pure Endowment Addition at end of 20 years	45	5
Preliminary Term	7½	None
Extra Premiums	5	5

Renewal commissions on any policy shall not extend beyond the premium-paying period.

Single-Premium Insurance

The commissions payable on Single-Premium Insurance policies shall be one per cent. (1%) of the premiums of such Single-Premium Insurance policies, plus one per cent. (1%) of the amounts of insurance.

Salary-Allotment Insurance

Commissions shall be at the same rates as for individual policies as set forth in these tables.

Modified Life Policy

With Change of Rate at End of Five Years

First policy year, 40% of premium.
Second to fifth policy year, inclusive, 5% of premiums.
Sixth policy year, 5% of the premium payable under the policy as in the first to fifth policy year, inclusive.
Sixth policy year, 40% on the excess of the premium in the said year over what the premium was in each of the five policy years preceding.
Seventh to tenth policy year, inclusive, 5% of premiums.

KIND OF POLICY One-Year Renewable Term Group Insurance *†‡	Per Cent. of Premiums First Policy Year	Second to Tenth Policy Year Incl.
First $1,000 of premiums or part thereof	20	5
Next 4,000 of premiums or part thereof	20	3
Next 5,000 of premiums or part thereof	15	1½
Next 10,000 of premiums or part thereof	12½	1½
Next 10,000 of premiums or part thereof	10	1½
Next 20,000 of premiums or part thereof	5	1½
Excess of premiums over $50,000.....	2½	1

*The premiums for the first policy year are the premiums which fall due within twelve months from the date of issue of the policy. The premiums for the second and subsequent policy years are those premiums which fall due in the second and subsequent periods of twelve months, respectively, from the date of issue of the policy.

†Includes Group Life, Accident and Sickness, or Accidental Death and Dismemberment Insurance issued to an employer and insurance on the One-Year Renewable Term plan issued to members of a group of one hundred or more persons who are borrowers from one bank under unsecured personal loans.

No commission shall be payable on account of any such policy issued upon the lives of members of any Association or Labor Union who are not actual employees of such Association or Labor Union.

‡The commission rates for One-Year Renewable Term Group Insurance shall apply only to such insurance as may be secured solely through the personal efforts of the Manager; except that in the case of increases or additions due to a change in the plan of insurance, or the inclusion of new classes or units by amendment, the Company shall have the right to determine what, if any, commissions shall be allowed the Manager.

WHOLESALE INSURANCE	PER CENT. OF PREMIUMS*	
	First Policy Year	Second to Tenth Policy Year Incl.
	35	5

*The premiums for the first policy year will include only those premiums paid which fall due within twelve months from the date of the first policy issued to a member of a group insured under the Wholesale plan.

The premiums for the second and subsequent years are those premiums paid which fall due in the second and subsequent periods of twelve months, respectively, from the date of the aforesaid first policy.

GROUP ANNUITIES	Per Cent of Net Considerations* First Contract Year	Second to Tenth Contract Year Incl.
First $20,000 of net considerations or part thereof	7.0	1.0
Next $30,000 of net considerations or part thereof	3.0	1.0
Next $450,000 of net considerations or part thereof	1.0	0.4
Excess of net considerations over $500,000	0.4	0.2

*The net considerations for any contract year are the total considerations due in such contract year and paid to the Company, less all refunds by the Company, either in cash or as a credit becoming due in such contract year on account of the withdrawal of employees from service.

The term "First Contract Year" refers to the twelve consecutive months starting with the effective date of the Group Annuity contract, and the term "Contract Year" as used in the expression "2d to 10th Contract Year, inclusive" refers to the nine periods of twelve consecutive months starting with the 1st to 9th anniversaries, respectively, of the effective date of the Group Annuity contract.

Retirement Annuity

First year commissions will be based on the length of the period during which premiums are payable as follows:

20 years or longer.....25% of the premium.
15 to 19 years.....20% of the premium.
10 to 14 years.....15% of the premium.

Renewal commissions will be allowed at the same rates as for Endowment policies with premium payments covering the same period.

Annuity (Single-Payment)

Commission shall be two per cent. (2%) of the purchase price.

10-Year or 15-Year Term	Per Cent. of Premiums First Policy Year	Second to Tenth Policy Year Incl.
$1,000 and less than $2,000	10	5
2,000 and less than 3,000	15	5
3,000 and less than 4,000	20	5
4,000 and less than 5,000	25	5
5,000 and upwards	30	5

If, however, any of the policies or Annuity contracts specified above are issued with premiums payable on a monthly basis (excluding all Group Insurance, Group Annuities, Wholesale Insurance and Salary Allotment Insurance policies), no commissions shall be payable on the first monthly premium, but commissions shall be payable on monthly premiums becoming due thereafter, as follows:

(a) On premiums falling due in the second to the eleventh policy or Annuity contract month, inclusive, first commissions at the rate set forth above;

(b) On premiums falling due in the twelfth policy or Annuity contract month commissions at twice the first-year commission rate as set forth above;

(c) On premiums falling due in the second to the tenth policy or Annuity contract year, inclusive, commissions at the rate and for the period specified as set forth above.

The commissions on premiums or considerations on all policies or Annuity contracts not named in the above tables shall be determined by the Company. [19]

Section 14.—That no commissions shall be paid to the Manager on account of any policy or Annuity contract, issued under this contract, after it has been lapsed or after the discontinuance of premium or consideration payments for any reason, by the insured, the annuitant or the holder of the policy or

Annuity contract; but, if during the continuance of this contract the Manager shall secure the revival of any policy or Annuity contract originally written by him personally, the Company will pay commissions thereon to the Manager in accordance with Section 13 hereof, as though the policy or Annuity contract had not been lapsed; but, where the Manager secures the revival of any policy or Annuity contract not written by him personally, the Company reserves the right to adjust credit and commissions in accordance with its general rule and practice.

Section 15.—That if a policy or Annuity contract issued under this contract is changed and an allowance or credit on account of such change is applied to premiums or considerations on the new policy or Annuity contract, the Company shall have the right to adjust the commissions, or to pay no commissions, as the Company may decide.

Section 16.—That if the Company shall return all the premiums or considerations or any portion thereof on a policy or Annuity contract issued under this or any previous contract, the Manager shall repay to the Company, on demand, the amount of commission received by him on premiums or considerations so returned.

Section 17.—That if a policy or Annuity contract issued under this contract replaces a policy or policies, or Annuity contract or Annuity contracts, previously issued by this or any other insurance company or society, the Company shall have the right

to adjust the commissions, or to pay no commissions, as the Company may decide.

Section 18.—That if a Modified Life Policy with Change of Rate at End of Five Years issued under this contract is changed to another kind of policy or an Annuity contract, the Manager shall not thereafter receive commissions as set forth herein for such Modified Life Policy, but the Company shall have the right to adjust the commissions in accordance with its general rule and practice.

Section 19.—That the Manager will not pay or allow, or offer to pay or allow, as an inducement to any person to insure or to purchase an Annuity contract, any rebate of premium or consideration or any inducement whatever not specified in the policy or Annuity contract.

Section 20.—That no assignment of commissions accrued or to accrue under this contract shall be valid as against the Company unless authorized in writing by the Company.

Section 21.—That the Company shall have and is hereby given a first lien upon any compensation, or claims therefor, under this or any prior contract, as security for the payment of any claims due or to become due to the Company from the Manager, and the Manager shall pay interest on any outstanding indebtedness at the rate of five per cent. (5%) per annum, the interest to be computed at the end of each contract year on the average indebtedness existing during such year.

Section 22.—That this contract may be terminated

by either party by a notice in writing delivered personally, or mailed to the other party at the last known address, at least thirty days before the date therein fixed for such termination; except that the Company may immediately terminate this contract if the Manager fails to comply with any of its conditions or obligations.

Section 23.—That if this contract be terminated the compensation to be paid to the Manager, his executors, administrators or assigns thereafter shall be:

(a) Commissions as provided in Section 13 hereof if terminated for any reason other than specified in Section 23 (b) hereof.

(b) If terminated because the Manager has violated the terms of Section 19 hereof; or if the Manager, either during the continuance or after the termination of this contract, shall default in the payment to the Company of premiums or considerations collected by him, or withhold or convert any money or property received by the Manager for or belonging to the Company or any of its policyholders, annuitants, beneficiaries or other payees, or if the Manager demands or accepts any remuneration from a policyholder, annuitant or beneficiary or their representatives for services in connection with the settlement of a claim or the securing of any right or privilege under a policy or contract issued by the Company, or if the Manager shall take any action towards inducing the Agents of the Company to leave its service or make any attempt to induce

its policyholders or annuitants to relinquish their policies or contracts, or shall exceed the limitations of authority set forth in this contract; the Manager shall forfeit all commissions which have otherwise been reserved to him by this or any previous contract.

Section 24.—That the Company shall incur no liability whatsoever by reason of furnishing information, upon inquiry therefor from any person, regarding the Manager's record with the Company, his personal character, habits, ability or cause for leaving the service of the Company.

Section 25.—That this contract shall take effect as of the second day of May, 1938, when signed by the Manager, and executed on behalf of the Company by the President, one of the Vice Presidents or the Secretary.

In Witness Whereof, the parties to this contract have executed the same, in duplicate, the day and year first above written.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
By HENRY B. SUTPHEN
Vice President.
CLAUDE R. FOOSHE
Manager.

Countersigned by:
A. E. N. GRAY
Assistant Secretary. [20]

MANAGER'S CONTRACT

Between The Prudential Insurance Company of America, Incorporated under the laws of the State of New Jersey, and Claude R. Fooshe, Manager.

Examined, W. E. Franck.

WJM [21]

This Contract,

made this fourth day of August 1919, by and between **The Prudential Insurance Company of America**, of Newark, N. J. party of the first part, and CLAUDE R. ROOKS of ST. LOUIS in the County of ST. LOUIS and State of MISSOURI party of the second part

Witnesseth: That the said parties, in consideration of the sum of one dollar each to the other in hand paid, and of the covenants and agreements hereinafter mentioned, hereby mutually covenant and agree, each with the other, as follows, to wit:

Section 1. That the said party of the first part hereinafter designated as the Company doth hereby appoint the said party of the second part hereinafter designated as the Manager or Manager for the following territory: [illegible] Sullivan, Linn, Chariton, Howard, Boone, Marion, Monroe, Shelby, Macon, Randolph, Audrain, Pike, Lincoln, Montgomery, Warren, Callaway, Osage, Gasconade, Franklin, Jefferson, St. Louis and Clark for the purpose of procuring applications for Ordinary insurance in the said Company with premiums payable annually, semi-annually or quarterly and for the further purpose of collecting and paying over premiums to the Company in cash on such insurance when effected, and of performing such other duties in connection therewith as may be required by said Company, and that this contract shall be treated as strictly confidential.

Section 2. That the Manager shall devote his entire time, talents and energies to the business of the Company and appoint agents in the territory named, for whose fidelity and honesty he shall be held responsible.

Section 3. That during the continuance of this contract and only upon the condition that the Manager as such remains continuously in the employ of the Company the compensation to be allowed the Manager shall be a commission on premiums when collected and paid to the Company in cash on policies written by or through him under this contract, as follows:

REGULAR POLICIES	Per Cent. of Premiums in the First Policy Year	Per Cent. of Premiums in the Second to the Tenth Policy Year, Inclusive	Per Cent. of Premiums in the Eleventh to the Fifteenth Policy Year, Inclusive
Whole Life	50	7½	5
30-Payment Life	60	7½	5
25-Payment Life	65	7½	5
20-Payment Life	60	7½	5
15-Payment Life	55	7½	5
10-Payment Life	50	7½	
5-Payment Life	15	7½	
30-Year Endowment	60	7½	5
25-Year Endowment	55	7½	5
20-Year Endowment	50	7½	5
15-Year Endowment	25	5	5
10-Year Endowment	20	5	
5-Year Endowment	10	5	
30-Payment 30-Year Endowment	55	7½	5
15-Payment 30-Year Endowment	35	5	5
15-Payment 25-Year Endowment	30	5	5
15-Payment 20-Year Endowment	25	5	5
10-Payment 25-Year Endowment	25	5	
10-Payment 20-Year Endowment	20	5	
10-Payment 15-Year Endowment	20	5	
20-Pay't Life with Pure End't Addition at End of 20 Years	60	7½	5
10-Year Term	50	7½	
Preliminary Term (Commission not allowed until regular premium is paid)	7½		
Single-Payment	5		
Annuity	2		
Extra Premiums	5		
One Year Renewable Term Group Insurance	10	5	

INTERMEDIATE POLICIES	Per Cent. of Premiums in the First Policy Year	Per Cent. of Premiums in the Second to the Sixth Policy Year, Inclusive
Whole Life	35	5
20-Payment Life	30	5
15-Payment Life	25	5
10-Payment Life	20	5
20-Year Endowment	30	5
15-Year Endowment	25	5
10-Year Endowment	20	5

Section 6. That on renewal premiums for the sixteenth and subsequent policy years, on Regular policies and for the seventh and subsequent policy years on Intermediate policies collected through his agency, on new business effected by or through the Manager under this contract, the Manager shall be entitled to a collection fee of two per cent. (2%) of such premiums, but the payment of such collection fees shall be subject to discontinuance at any time in the event of the Company making other arrangements for the collection of the premiums, and, if not previously discontinued, shall cease upon the termination of this contract.

Provided, however, that when premiums, either first or renewal, on policies issued under this contract are collected otherwise than by the Manager during the continuance of this contract, a collection fee of two per cent. (2%) of such premiums shall be deducted from the commissions to be allowed as provided in Section 3.

Provided further, that on premiums on business not issued by or through the Manager, but transferred to him for collection, he shall be allowed a collection fee of two per cent. (2%) of the premiums, which collection fees, however, may be discontinued at any time in the event of the Company making other arrangements for the collection of the premiums.

Section 5. That if this contract shall be terminated for any cause, except violation of its conditions, the commissions on the balance of the first year's premiums on policies issued through the Manager remaining unpaid at the termination of this contract, shall be payable to the Manager, his executors' administrators or assigns, subject to the conditions of Section twenty-three (23).

Section 6. That if this contract shall be terminated for any cause other than violation of its conditions, or the death of the Manager, and the Manager has been continuously in the service of the Company for two or more years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the tenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated by the death of the Manager and if he has been continuously in the service of the Company for two or more years, the Company will continue to pay to his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the fifteenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions before the Manager shall have been continuously in the service of the Company for two years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Intermediate policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

Section 7. That if the Manager shall at any time violate any of the conditions of this contract, he shall forfeit all commissions which would thereafter have become payable under this or any previous contract.

Section 8. That if the Manager, at any time after the notice of the termination of this contract, shall take any action toward inducing the agents of the Company to leave its service, or make any attempt to induce its policyholders to relinquish their policies, he shall forfeit all commissions which would thereafter have become payable under this or any previous contract.

Section 9. That no commission shall be paid to the Manager on any policy after it has been canceled or become paid-up. But if the Manager, while in the employ of the Company under this contract, shall secure the revival of any policy issued under this contract, after such policy has been canceled, he shall be entitled to the commission on such policy as provided in Sections three (3) and four (4) as though policy had not been canceled.

Section 10. That the Company may make any changes in its methods of conducting its business, may divide the territory heretofore mentioned and make any other appointments therein.

Section 11. That the Manager shall not insert or authorize the insertion of any advertising matter in any publication whatever, or issue or circulate or authorize the issuing or distribution of any circulars or papers, or write or authorize the writing of any letters to any publication respecting any life insurance company, and that the Manager shall not use or authorize the use of language, orally or in writing, respecting any company tending to bring such company into disrepute.

Section 12. That the Manager shall send to the Company *an exact copy* of all contracts and amendments thereto entered into with agents, that when contracts are terminated, the Manager shall notify the Agent by letter of such termination and shall immediately send to the Company a copy of such letter together with termination form; that such agents shall have no claim against the Company, but in case of the termination of this contract the Company may and is empowered to carry out at its option any agreements as to the payment of renewal commissions contained in the contracts of any agents which may have been terminated by the termination of this contract, and that all payments made to agents by the Company *on* account thereof shall be deducted from the amounts payable to the Manager, his executors, administrators or assigns, by the terms of this contract; that the Manager shall in no case make a contract with an agent providing for greater compensation than that provided for in this contract, that the Company will not approve any contract between the Manager and an agent in which renewal commissions on Regular policies have been allowed beyond the tenth year of insurance or in which renewal commissions on Intermediate policies have been allowed beyond the sixth year of insurance. And the Manager further agrees to promptly terminate any contract or agreement with an agent when requested by the Company so to do.

Section 13. That the branch office occupied by the Manager shall be subject to the Company's control. If a written lease is required, it must be in the Company's name and a copy filed at the Home Office, and the Manager shall not negotiate a lease unless authorized in writing by the Company so to do. In case there is no written lease, the office is to be wholly under the control of the Company. These conditions apply whether the Manager or the Company pays the rent.

Section 14. That the Manager shall be governed in the business of his agency by the written and printed instructions and rules which he may from time to time receive from the Company; that he shall keep correct accounts and records of all business done and moneys collected, and that all books, accounts, documents, vouchers and other papers connected with the business of the Company are and shall be its property, and at any time open to the inspection and examination of its authorized representative, and that the Manager shall report to the Company in writing, at such times as he may be instructed so to do the collection of all premiums on policies and receipts sent to him for collection to the date of such accounting.

Section 15. That all moneys or securities received or collected for or on behalf of the Company, after making such deductions as are herein allowed, shall be held by the Manager as a fiduciary trust, and shall not be used by him for any purpose whatsoever, except as herein specifically authorized, but shall be immediately deposited, in a bank designated by the Company, to the credit of The Prudential Insurance Company of America, or shall be paid over to such person as the Company may designate.

Section 16. That the Manager shall not incur or authorize the incurring of any expense or expenditure whatever on account of this Company without the written authority of the Company.

Section 17. That the Manager has no authority on behalf of the Company to make, alter or discharge any policy, to extend the time for paying a premium, to waive forfeitures, to incur any liability on behalf of the Company, to allow the delivery of any policy unless the applicant be in good health and the first premium paid in full, or to receive any money due or to become due to the Company except on policies and renewal receipts signed by the President, one of the Vice Presidents or the Secretary of the Company and sent to him for collection.

Section 18. That, unless otherwise terminated, this contract may be terminated by either party by a notice in writing delivered personally or mailed to the other party at the last known address, at least thirty days before the date therein fixed for such termination. In case the Manager fails to comply with any of the duties, conditions or obligations of this contract the Company may terminate same upon immediate notice.

Section 19. That when policies issued under this contract are changed and allowance is made on an old policy and applied on a new policy, no commission shall be paid on the amount thus allowed, unless authorized by the Company, that if the Company shall return premiums on a policy issued under this contract, the Manager shall repay to the Company, on demand, the amount of commissions received on the premiums so returned.

Section 20. That no assignment of commissions earned or accrued or to accrue under this contract shall be valid unless authorized in writing by the Company.

Section 21. That if this contract be terminated, the compensation paid to the Manager, with the amount then due him under this contract, shall be in full settlement of all claims and demands in favor of the Manager under this contract, and that all compensation which a continuance of this contract might have secured to him shall be forfeited, except as herein provided.

Section 22. That the Manager shall not pay or allow, or offer to pay or allow, as an inducement to any person to insure, any rebate of premium, or any inducement whatever not specified in the policy.

Section 23. That the Company shall have and is hereby given a first lien upon any commissions or claims for commissions under this or any prior contract as security for the payment of any claims due or to become due to the Company from said Manager, and the Manager shall pay interest on any outstanding indebtedness at the rate of five per cent (5%) per annum, the interest to be computed at the end of each contract year on the average indebtedness existing during such year.

Section 24. That when a policy issued under this agreement is the cause, directly or indirectly, of the cancelation of a policy previously issued by the Company, the Company reserves the right to adjust the payment of commissions as the circumstances of the case seem to warrant.

Section 25. That no compensation shall be allowed on any premium, or portion thereof, payment of which is waived because of the Disability clause contained in the policy.

Section 26. That this contract shall take effect on the fourth day of August 1917, when signed by the Manager and executed on behalf of the Company by the President and one of the Vice Presidents or by the President and the Secretary.

In Witness Whereof, *the parties to this contract have executed the same in duplicate on the day and year first above written.*

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Party of the First Part.

By

Countersigned by

Assistant Secretary.

President.

Vice President.

Party of the Second Part.

MANAGER'S CONTRACT

BETWEEN

THE PRUDENTIAL INS. CO. OF AMERICA

[illegible] the State of New Jersey

AND

Claude W. Forde

Manager

EXAMINED

[illegible]

Manager Division

AUDITOR'S DEPT COMMISSION DEPT

ORD 4827 REV 5-10 5-10

40

The Prudential Insurance Company of America

Incorporated under the laws of the State of New Jersey
EDWARD D. DUFFIELD, *President*
HOME OFFICE, NEWARK, NEW JERSEY

IT IS HEREBY AGREED by and between The Prudential Insurance Company of America, and [illegible], Manager for the said Company, that in consideration of the surrender by each of the said parties of their respective rights under all provisions in the existing contract, as heretofore amended, between the said Company and the said Manager concerning the payment of collection fees and the payment of commissions after termination of said contract, as heretofore amended, such provisions are hereby repealed and terminated as of the date of the execution of this agreement, and in place thereof the following provisions are hereby substituted effective from the date hereof.

Collection Fees.

That after commissions, upon policies written by or through said Manager, are no longer payable under the contract, as heretofore amended, of which this is an amendment, and as amended hereby, and hereinafter referred to as this contract, the said Company shall pay to the said Manager a collection fee of two per cent. (2%) of the premiums of all such policies and upon premiums of all policies transferred to him for collection, when in either case such premiums are collected by or through him, excepting that such collection fee on premiums in any policy year on group insurance policies shall be two per cent. (2%) of the first $50,000 of the premiums of each such policy, and one per cent. (1%) on the next $150,000 of premiums of each such policy, but no collection fee shall be payable on any part of such premium which is in excess of $200,000; nor, except as hereinafter provided, shall a collection fee be paid to said Manager upon any premiums when collected by or through his agency under this contract concerning which said Company has waived, by agreement, its right to deduct any collection fee from the commissions payable to some other Manager or his estate, where such waiver is in accordance with the agreement of said Company with such other Manager; and only one per cent. (1%) collection fee shall be payable to said Manager on any premiums concerning which the Company has agreed to deduct but one per cent. (1%) from the commissions payable to some other Manager or his estate.

Terminal Commissions.

That if this contract be terminated the compensation to be paid the Manager thereafter shall be:

(a) If terminated by the death of the Manager, his retirement at age 65 or later, his total and permanent disablement, or the withdrawal of the Company from the territory set forth in this contract, the Company will pay the Manager, his executors, administrators or assigns, commissions when and as set forth in this contract, less a collection fee of one per cent. (1%); provided, however, that where the Manager is obligated to pay an agent or a broker a renewal commission of five per cent. (5%); or a renewal commission of two and one-half per cent. (2½%) or more upon premiums on which said Manager is entitled under this contract to but five per cent. (5%) renewal commission, no collection fee shall be deducted from the said commissions as set forth in this contract, during the period for which such renewals are payable to the said agent or broker.

(b) If terminated for any cause other than those mentioned in Paragraph, a or c hereof, the Company will pay to the Manager, his executors, administrators or assigns, commissions, when and as set forth in this contract, up to and including but not beyond the tenth policy year, less a collection fee of two per cent. (2%), provided, however, that if the Manager has not been continuously in the service of the Company for at least two years no such commissions will be payable beyond the sixth policy year.

(c) If terminated because he has paid or offered to pay or allow as an inducement to any person to insure any rebate of premium, or if the Manager either during the continuance or after the termination of this contract shall default in the payment to the Company of premiums collected by him or shall take any action towards inducing the Agents of the Company to leave its service or make any attempt to induce its policyholders to relinquish their policies, he shall forfeit all commissions which have otherwise been reserved to him by this or any previous contract.

IN WITNESS WHEREOF the parties hereto have executed this amendment in duplicate on the 27th day of May, 1927.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

By [signature]
Assistant Secretary

[signature]
Manager.

67196

EXHIBIT D

The Prudential Insurance Company of America
Edward D. Duffield, President
Home Office: Newark, N. J.

Claude R. Fooshe, Manager
St. Louis Ordinary Agency
601-610 Mississippi Valley Trust Building
506 Olive Street
Main 0695 St. Louis, Mo.

February 23, 1938

Mr. G. H. Chace, Vice Pres.
Ordinary Agencies,
Newark, N. J.

[Initialed]: SM C

Dear Mr. Chace:

I am wiring you tonight stating that I have decided to accept transfer to Los Angeles.

I would just like to check to see if I understand correctly. I am to receive $1.00 per thousand bonus on all net increase made. I am to receive 5% on commissions paid agents, first year. Further, I am to receive a salary which was not yet determined, but which I believe you intimated would be in excess of $500 per month. The amount in excess of same, though, I believe you wanted to get some figures pertaining to this agency or that one out there. Anyway, I don't believe this was definite.

I know you will take into consideration what I am turning over to the Company here as well as my length of service and, further, I know you realize that I will do a job for the Company such as they

would expect me to do. So, I will await your advise on the salary, but will delay nothing awaiting that.

I understand, further, that the Company will pay all office expenses, Assistant Managers, and will allow me commissions on my own business. I did not get word from Mr. MacLeod, though, as to how you treat a new terms Manager pertaining to renewals. I know though, that it would be treated the same as other mngrs. I presume they will pay any traveling expenses incurred for visiting agents.

I do not want to make a whole lot of requests. One though, I would like you to please grant from the outset, and that is to allow me as liberal an arrangement for making contracts as possible, so that I will not be handicapped by the other office being able to do what I can't do. With my experience, I feel sure you will, at an early date, permit me to try out a plan of some advances. I hope you will see fit to do this, inasmuch as I have done a great deal of it on my own part and have been fairly successful.

I realize you are going to be away from the Home Office after the end of this week. I would appreciate your writing me, before leaving or have Mr. MacLeod answer it in detail. Naturally, there will be a lot to do on my part in making the transfer. Whether or not you would rather I would go out there and stay a month and then come back here and stay a week or ten days and then go to the Convention from here, rests entirely with you. I do believe this would be a better arrangement, as weather conditions would be more favorable the latter part of April or [27]

Mr. Chace, page 2.

the first of May to show my place. I could stay there, say from March 15 until April 15 or 20. Mrs. Fooshe would not go with me at that time. She would join me later or go out with me after I get back from the Convention. This would let me get things well lined up in Los Angeles. You might advise me by Air Mail when you would like me to make the transfer effective.

My thought was, that if I did this, then any problems arising, I could get straightened out when I came back to attend the Convention. A lot of this would depend, of course, as to whether or not Mr. MacLeod went out with me to introduce me. Frankly, I do not think this necessary. I would like him, however, to visit this agency prior to the time I left, if possible.

This has been quite a decision to make, but I feel it will be a wise one for Mrs. Fooshe and myself for the future, and I further feel that I will be able probably, to be of more value to the Company there than I would be here.

I will appreciate your writing me by Air Mail so I will get it by Saturday, if it is at all possible.

With kindest personal regards, I am,

Very truly yours,

CLAUDE R. FOOSHE,

Manager.

CRF:ms

P. S. I understood I would receive the full renewals same as had I remained here only the Co.

will bear expense for collecting to the 10th yr. I presume all of this is set out in a letter so will leave it all with you. CRF. [28]

EXHIBIT E

The Prudential Insurance Company
of America
Edward D. Duffield, President
Home Office, Newark, New Jersey

Ordinary Agencies
George H. Chace
Second Vice President
Albert E. N. Gray
Assistant Secretary
Sayre MacLeod, Jr.
Theodore D. Miller
Arthur L. Stephans
Robert E. Wilkins
Supervisors
Walter D. Lemon
Assistant Supervisor

February 24, 1938.

Personal
Mr. C. R. Fooshe, Manager,
St. Louis, Mo.

Dear Mr. Fooshe:

While I am personally dictating this letter, I shall be out of the office before it is written, so Mr. MacLeod will sign for me.

Replying to your letter of yesterday's date, you have a correct understanding of the contingent compensation, except that you will note from the enclosed copy of the New Terms Manager's contract that it goes a little further than you thought in that the 5% is paid also on the Manager's commissions.

We feel that we can justify a starting salary of $600 a month in the light of the business at present in force and what production has been of recent years. It is customary to consider the guaranteed salary of each New Terms Manager at the close of each fiscal year and make additions to the salary where the size and the record of the Agency warrants it. This does not necessarily mean that you will receive an increase in guarantee at the end of your first fiscal year. It is contemplated that year by year an increasing proportion of the Manager's compensation from the Agency should come from contingent sources rather than that he should rely on increases to his guarantee in order to increase his total income.

You are correct in your understanding that the Company will pay the salaries of the Assistant Managers, postage, telephone and the necessary travel expense in visiting outside Agents. In fact, it is customary to pay all the regular expenses in a New Terms office except some minor incidentals which might amount to a few hundred dollars a year, such as subscriptions to insurance magazines, insurance services, etc. Rather than to try to itemize all the small incidentals that we do not pay, we suggest that

experience will show you which ones we do not cover and which ordinarily amount to only a few hundred dollars a year.

On his personal business the New Terms Manager receives full renewal commissions.

As to the type of Agent's contract, I am enclosing a copy of the form that will be used in Los Angeles. You will note from this that in some respects it is more liberal than the contracts made between Old Terms Managers and Agents. [29]

-2-

Mr. C. R. Fooshe, Manager, February 24, 1938.

With this type of Agent's contract, the Manager has very little protection in advancing money to an Agent until by his production he has built up a considerable amount of renewal income. We have not yet seen any way to get around this particular difficulty.

We have given some thought as to when you might take charge of the Agency. It seems to us as though very little would be gained by your hurrying out there. It would seem better for you to remain in the St. Louis Agency until after the Home Office Convention, which is scheduled for the last week in April. The change might be made officially for May 1 or possibly May 2, in view of the fact that May 1 is a Sunday. In the meantime not much, if anything, would be lost by leaving Mrs. Reeder in charge in the Los Angeles office as the Acting Manager. How would this arrangement appeal to you?

Referring to your postcript, you are correct in your understanding that full renewals will be paid on the business in the St. Louis Agency after the termination of the Old Terms contract, just as though the contract remained in force. In other words, no collection fee will be imposed on the business for which you have qualified for renewal commissions. Naturally, the collection fee that you would receive if you remained in St. Louis under the Old Terms contract on business on which your renewal interest has expired would be discontinued.

We are pleased with your decision to take the Los Angeles Agency and while I shall have an opportunity to wish you well there before you go out, I should like to get the good wishes to you at this time in a preliminary way.

Cordially yours,

GEO. H. CHACE

SM

Second Vice President.

GHC:EK [30]

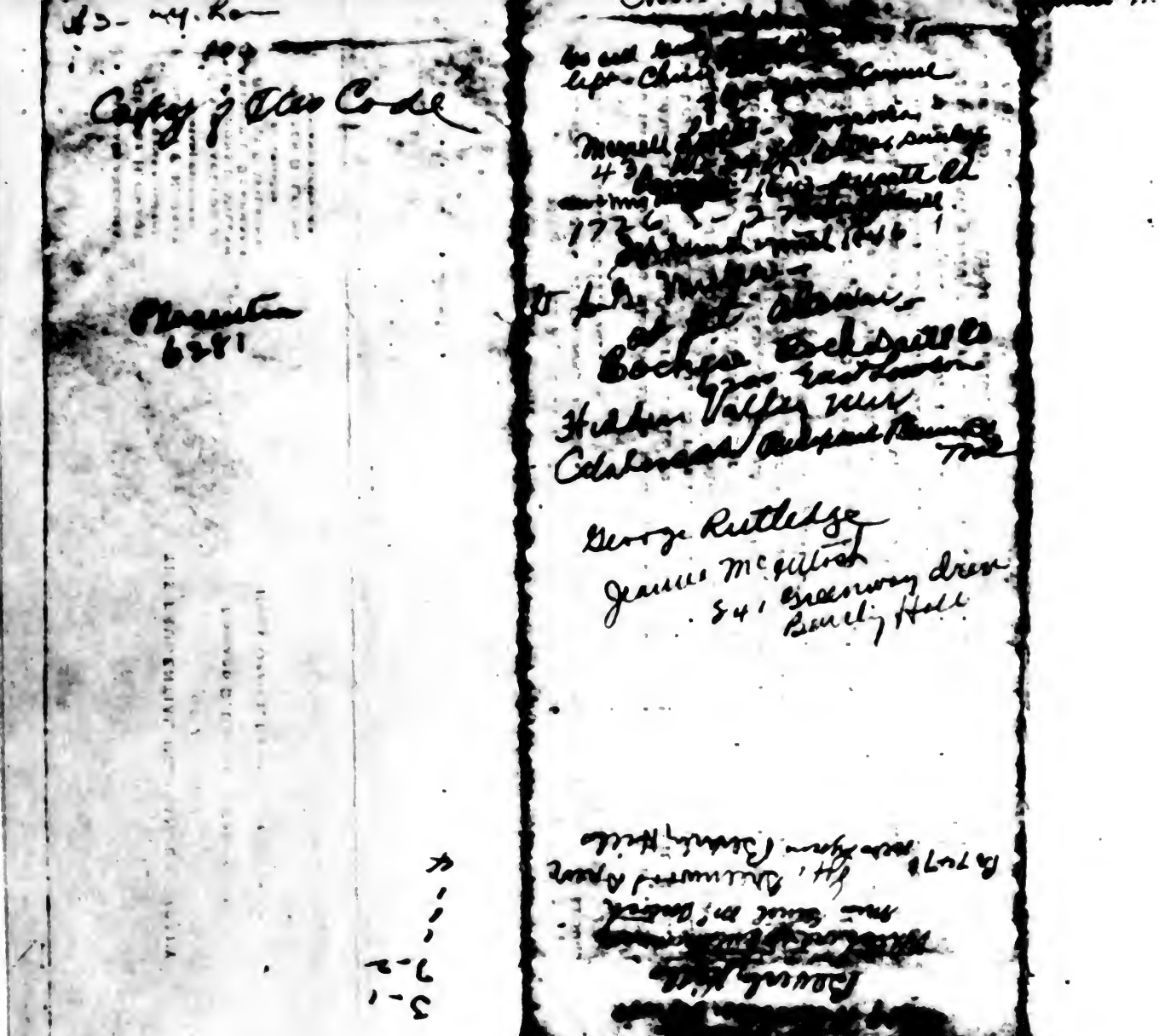

EXHIBIT F

The Prudential Insurance Company of America
Edward D. Duffield, President
Home Office, Newark, New Jersey

Ordinary Agencies
George H. Chace
Second Vice President
Albert E. N. Gray
Assistant Secretary
Sayre MacLeod, Jr.
Theodore D. Miller
Arthur L. Stephans
Robert E. Wilkins
Supervisors
Walter D. Lemon
Assistant Supervisor

March 14, 1938.

Mr. C. R. Fooshe, Manager,
St. Louis, Mo.

Dear Mr. Fooshe:

In view of your acceptance of the offer made by Mr. Chace to appoint you Manager for the Company at its Los Angeles "A" Office under a New Terms Manager's form of contract, effective May 2, 1938, notice is hereby given in accordance with the terms of your current contract that the said current contract will be terminated as of the thirtieth day of April 1938.

Cordially yours,
A. E. N. GRAY
Assistant Secretary.

AENG:EK [32]

EXHIBIT G

The Prudential Insurance Company of America
Home Office, Newark, New Jersey

George H. Chace
Vice President

April 17, 1940.

Mr. C. R. Fooshe, Manager,
Los Angeles, Calif.

Dear Mr. Fooshe:

To clarify the point you raised while at the Home Office, I would inform you that your change as Manager from St. Louis to Los Angeles was simply a transfer and did not of necessity involve the termination of the original contract. It was felt, however, that the change to the new form of contract would be best for all concerned. This was mutually agreed upon. As a consequence, the old contract was terminated without any surrender charge and the new contract was put into effect.

Very truly yours,

(Signed) GEORGE H. CHACE

Vice President.

GHC:EKL [33]

EXHIBIT H

Treasury Department
Affidavit

Re: Claude R. Fooshe
State of New Jersey
County of Essex—ss

George H. Chace, being duly sworn upon his oath according to law deposes and says:

I am a Vice-President of The Prudential Insurance Company of America, in charge of Ordinary agencies.

Early in 1938, when Mr. Claude R. Fooshe was contemplating a transfer from the managership at St. Louis to that at Los Angeles, he discussed with me the remuneration he would receive, in the event of transfer under the "New Terms" manager's contract under which he would have to operate in Los Angeles. The "New Terms" contract provides for a guaranteed monthly salary and certain contingent commissions, and Mr. Fooshe was dubious about leaving St. Louis and giving up his "Old Terms" contract for the salary of $600 a month then tentatively proposed.

Because of his ability and long experience as a manager for the Company, Mr. Fooshe was justified in his position; on the other hand, the Company preferred not to commit itself to the indefinite payment of any larger guaranteed salary.

The contract then existing between Mr. Fooshe and the Company was dated August 4, 1919. A printed amendment of May 17, 1927, provided, in effect,

that should the contract be terminated under paragraph (b) of such amendment, the Company would pay to Mr. Fooshe the renewal commissions scheduled in his contract (as amended), up to and including the tenth policy year, less a collection fee of 2%.

It was agreed that Mr. Fooshe should receive a guaranteed salary of $600 per month and in order that his income would not suffer [34] a reduction by reason of his acceptance of the managership at Los Angeles, the Company agreed to waive the imposition of the 2% collection fee on renewal commissions payable on business issued through the St. Louis Agency, as set forth in paragraph (b) of the amendment referred to above. This arrangement was agreeable to Mr. Fooshe. It was felt by waiving this 2% collection fee that the amount that would accrue to Mr. Fooshe together with the guaranteed salary to be paid him would be ample compensation for the supervision of the Los Angeles Agency. Further, while the collection fee would eventually cease, in the interim Mr. Fooshe would have an opportunity to develop the Los Angeles agency and, if successful, would in due course have built up his income to approximately what it would have been had he continued at St. Louis.

This is the agreement to which Mr. Fooshe referred in the postscript to his letter of February 23, 1938.

GEORGE H. CHACE

Subscribed and Sworn to before me this 25th day of October, 1940.

WILSON J. McDONALD
Notary Public of New Jersey
My Commission Expires
August 4, 1943 [35]

[Title of Board and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the parties to the above-entitled case, through their respective counsel, as follows:

18. That Claude R. Fooshe, petitioner, is, and was during the entire year of 1938 and for many years prior thereto, married to Lura D. Fooshe.

19. That petitioner and his wife, Lura D. Fooshe, are and have been residents of and domiciled in the State of California since May 1st, 1938.

20. That one-half the sum of $21,504.80 involved in this proceeding was returned on each of the separate income tax returns of Claude R. Fooshe and Lura D. Fooshe.

JOHN L. WHEELER
Counsel for Petitioner

(Signed) J. P. WENCHEL
EAT
Chief Counsel
Bureau of Internal Revenue
Counsel for Respondent

[Endorsed]: U.S.B.T.A. Filed Dec. 9, 1941. [36]

[Title of Board and Cause.]

FINDINGS OF FACT AND OPINION

Docket No. 106640. Promulgated January 27, 1942.

Petitioner, the manager of an insurance agency in a noncommunity state, was induced to accept an agency in California by the agreement of the company to waive its right to collection charges upon renewal commissions earned in the noncommunity state and payable as collected to the petitioner while employed as manager. Held, that such commissions paid without deduction of the company's collection charge to the petitioner while employed by the company in California, had their inception in the noncommunity state and constituted separate property of the petitioner.

John L. Wheeler, Esq., for the petitioner.

Frank T. Horner, Esq., for the respondent.

This proceeding involves income taxes for the calendar year 1938. Deficiency was determined in the amount of $1,436.37. The petitioner contends that there was error as to only a portion thereof. The question presented is whether the major portion of $21,504.80, income received during the taxable year is community income under the law of California. Upon brief the petitioner concedes that a minor part (approximately one-fifth) of the above amount was by the Commissioner properly included in income.

FINDINGS OF FACT.

The parties filed a stipulation of facts which, together with certain exhibits referred to therein and attached thereto and received in evidence, constitute all of the evidence adduced. The exhibits are extensive, and we should not merely adopt them in extenso as findings. We therefore adopt and make a part of our findings the stipulation, and summarize the exhibits, so far as pertinent, as follows:

The parties stipulate and we find:

1. The petitioner is at present, and has been since about the first of May, 1938, manager of an ordinary agency, at Los Angeles, California, of the Prudential Insurance Company of Newark, New Jersey, under certain agreements in [37] this stipulation mentioned, entered into by and between the said Prudential Insurance Company and the petitioner. Under date of April 25, 1938, a contract was entered into by and between the petitioner and the said company, effective on or about May 1, 1938. A copy of this contract is attached as Exhibit A, and may be received in evidence.

2. On or about August 4, 1919, the Prudential Insurance Company and the petitioner entered into a contract with respect to his services as manager of an ordinary agency at St. Louis, Missouri. A copy of this contract is attached as Exhibit B, and may be received in evidence.

3. On or about May 17, 1927, the contract of

August 4, 1919 (Exhibit B, paragraph 2 hereof), was amended. A copy of this amendment is attached hereto as Exhibit C, and may be received in evidence.

4. In order to provide some inducement to the petitioner to relinquish his position in St. Louis, Missouri, and assume the management of an ordinary agency in Los Angeles, California, it was agreed that the petitioner would be paid the full terminal commissions on renewal premiums under the contract of 1919 (Exhibit B, paragraph 2 hereof) without deduction by the said insurance company of the collection fee of two percent. No formal written agreement, in the form of a contract, was executed by the parties. However, the agreement just referred to was expressed in a letter written by the petitioner at St. Louis, Missouri, under date of February 23, 1938, and addressed to the Prudential Insurance Company, a copy of which is attached hereto as Exhibit D, and may be received in evidence.

5. In a letter dated February 24, 1938, the Prudential Insurance Company replied to the petitioner's letter (Exhibit D, above), confirming the understanding of the petitioner as expressed in the abovementioned letter (Exhibit D). A copy of the said reply is attached hereto as Exhibit E, and may be received in evidence.

6. On March 14, 1938, the Prudential Insurance Company addressed the petitioner, a copy of which

communication is attached hereto as Exhibit F, and may be received in evidence.

7. Pursuant to the agreements and contracts referred to in this stipulation, the petitioner came to California from St. Louis, Missouri, on or about May 1, 1938, to perform the services in Los Angeles, California, provided for under the said agreements and contracts.

8. Prior to May 1, 1938, the petitioner was the St. Louis, Missouri, manager of an ordinary agency of the Prudential Insurance Company of Newark, New Jersey, under a contract executed in 1919 and amended in 1927 (Exhibits B and C).

9. Between the time of the petitioner's arrival in Los Angeles, California, on or about May 1, 1938, to assume his new duties, and the end of the taxable year 1938, which year is involved in this proceeding, the petitioner received from the Prudential Insurance Company of Newark, New Jersey, the sum of $21,504.80, all of which has been included by the respondent in the taxable income of the petitioner for 1938. This sum of money represented the equivalent of two and one-half per cent of the premiums collected in the said St. Louis ordinary agency after April 30, 1938, and paid by policyholders on policies issued while the petitioner was manager of the ordinary agency of the said insurance company at St. Louis, Missouri, under the contracts herein mentioned (Exhibits B and C).

10. At the close of business December 31, 1937, there was in force in the ordinary agency at St.

Louis, Missouri, in the territory of which the petitioner [38] had charge, $49,122,406.00 of life insurance issued by the Prudential Insurance Company, of which amount the sum of $5,153,004.00 represented new life insurance written under the supervision of this petitioner during the year 1937.

11. At the close of business December 31, 1937, the territory in Los Angeles, California, to which the Prudential Insurance Company later transferred the petitioner as a manager of an ordinary agency had in force life insurance issued by the Prudential Insurance Company in the amount of $29,077,437.00, of which amount $846,237.00 represented new life insurance issued in said Los Angeles territory during the year 1937.

12. In 1938, the standard form of ordinary manager's contracts used by the Prudential Insurance Company was different from that in use in 1919. Acceptance by the petitioner in this case of the Los Angeles managership of an ordinary agency, solely on the basis of the said standard new form of contract in use in 1938, and without any change in the 1919 contract (Exhibits B and C), would have resulted in a substantial decrease in the petitioner's compensation immediately after his arrival in Los Angeles, California, because of the fact that less life insurance was in effect in said Los Angeles agency than had been in effect in St. Louis, and, also, on the basis of the new life insurance issued in 1937 in said Los Angeles agency, the said new insurance to be issued in the following year (1938)

would probably have been less than had been written during the last year (1937) of Mr. Fooshe's managership in St. Louis, Missouri.

13. In response to a request of the petitioner for information as to the reason for the termination, by the Prudential Insurance Company, of his St. Louis, Missouri, contract of 1919 (Exhibit B), the Prudential Insurance Company advised Mr. Fooshe, the petitioner, under date of April 17, 1940, a copy of which communication is attached hereto as Exhibit G, and may be received in evidence.

14. If the Prudential Insurance Company had not waived its right to deduct the collection fee of two per cent from the terminal commissions payable to the petitioner under the St. Louis ordinary managership contract of 1919, after Mr. Fooshe assumed the new position in Los Angeles, California, the petitioner would still have been entitled to the net amount representing one-half per cent of the renewal premiums collected by the said St. Louis office, of which the petitioner was manager until about the first of May, 1938.

15. The contract between the Prudential Insurance Company and the petitioner, which was executed on August 4, 1919 (Exhibit B, paragraph 2 hereof), provided for the payment by the Prudential Insurance Company to its manager the commissions specified therein of the renewal premiums on insurance policies issued, of which percentage the manager of the ordinary agency, in this case the petitioner, was entitled to receive personally and

retain for his personal use only two and one-half per cent, the balance being paid to the particular agent writing the insurance. While the amount to be retained by the manager varies in certain instances, yet for the purposes of this particular case, the parties agreed that the Board may accept as a fact, as a basis for its consideration and determination of the issue in this case, that the petitioner's commissions on the collection of premiums on the policies written under his supervision while manager at St. Louis, amounted to two and one-half per cent.

16. The return of the petitioner for the year 1938 was filed with the United States Collector of Internal Revenue at Los Angeles, California.

17. Attached is a copy of an affidavit of George H. Chace, executed October 25, 1940, marked Exhibit H, and may be received in evidence.

18. That Claude R. Fooshe, petitioner, is, and was during the entire year of 1938 and for many years prior thereto, married to Lura D. Fooshe. [39]

19. That petitioner and his wife, Lura D. Fooshe, are and have been residents of and domiciled in the State of California since May 1st, 1938.

20. That one-half the sum of $21,504.80 involved in this proceeding was returned on each of the separate income tax returns of Claude R. Fooshe and Lura D. Fooshe.

From the exhibits to which the above stipulation refers, we further find:

Exhibit A, the contract of August 4, 1919, between the petitioner and the Prudential Insurance

Co. (hereinafter called the company) provided, in sum, that the manager should devote his entire time, talent, and energies to the company's business, that his compensation should be a commission on premiums collected on policies written by or through the petitioner under the contract, to be paid during the continuance of the contract and only upon condition that the manager, as such, remain continuously in the employ of the company, and that the commission should be according to a certain schedule (set forth in section 3) until and including the fifteenth policy year. As to later years, section 4 provides:

Section 4. That on renewal premiums for the sixteenth and subsequent policy years on Regular policies and for the seventh and subsequent policy years on Intermediate policies collected through his agency, on new business effected by or through the the Manager under this contract, the Manager shall be entitled to a collection fee of two per cent. (2%) of such premiums, but the payment of such collection fees shall be subject to discontinuance at any time in the event of the Company making other arrangements for the collection of the premiums, and, if not previously discontinued, shall cease upon the termination of this contract.

Provided, however, that when premiums, either first or renewal, on policies issued under this contract are collected otherwise than by the Manager during the continuance of this contract, a collection fee of two per cent. (2%) of such premiums shall

be deducted from the commission to be allowed as provided in Section 3.

Provided further, that on premiums on business not issued by or through the Manager, but transferred to him for collection, he shall be allowed a collection fee of two per cent. (2%) of the premiums, which collection fees, however, may be discontinued at any time in the event of the Company making other arrangements for the collection of the premiums.

Section 6 reads:

Section 6. That if this contract shall be terminated for any cause other than violation of its conditions, or the death of the Manager, and the Manager has been continuously in the service of the Company for two or more years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the tenth year of the insurance shall have been paid, subject to the conditions of Section twenty-three (23). [40]

That if this contract shall be terminated by the death of the Manager and if he has been continuously in the service of the Company for two or more years, the Company will continue to pay to his executors, administrators or assigns, the commissions upon renewal premiums on Regular poli-

cies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the fifteenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions before the Manager shall have been continuously in the service of the Company for two years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the Commissions upon renewal premiums as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Intermediate policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

Though an amendment of the contract, which was executed in 1927, was placed in evidence, we find nothing therein which is material herein. The parties

have stipulated all pertinent facts in the contract (Exhibit A) executed April 25, 1938.

Prior to the agreement of April 25, 1938, a letter and postscript (Exhibit D), was written by the petitioner to G. H. Chace, vice president of the company, expressing the agreement as to payment to the petitioner of full terminal commissions (2½% to petitioner) under the old contract, without deduction of the 2 percent collection fee by the company. In material part that letter, dated February 23, 1938, reads:

P.S. I understood I would receive the full renewals same as had I remained here only the Co. will bear expense for collecting to the 10th yr. I presume all of this is set out in a letter so will leave it all with you.

To such letter G. H. Chace responded on February 24, 1938 (Exhibit E), in material part:

Referring to your postscript, you are correct in your understanding that full renewals will be paid on the business in the St. Louis Agency after the termination of the Old Terms contract, just as though the contract remained in force. In other words, no collection fee will be imposed on the business for which you have qualified for renewal commissions. Naturally, the collection fee that you would receive if you remained in St. Louis under the Old Terms contract on business on which your renewal interest has expired would be discontinued.

In view of the petitioner's acceptance of the offer to appoint him manager at Los Angeles, the com-

pany on March 14, 1938, gave notice [41] (Exhibit F) of cancellation of the old contract. On April 17, 1940, the company wrote the petitioner a letter (Exhibit G), stating in effect that the change to the new contract did not of necessity involve limitation of the old, but that as a change to the new form of contract was mutually felt to be best for all, the old contract was terminated without any surrender charge and the new contract put into effect. The contract entered into between the company and petitioner on April 25, 1938, provided compensation to him on the basis of $600 per month salary guaranteed to be paid, plus contingent commissions largely based on first year commissions.

The parties stipulated that an affidavit by G. H. Chace (Exhibit H) should be received in evidence. In material part it reads as follows: that early in 1938 the petitioner, in contemplating the change to the Los Angeles managership, was dubious about leaving the position at St. Louis for a salary of $600 per month and contingent commissions; that in order that his income would not suffer a reduction by the move to Los Angeles, the company agreed to waive the imposition of its 2 percent collection fee on renewal commissions payable on business issued through the St. Louis agency; that it was felt that by waiving the 2 percent collection fee, the amount accruing to Fooshe, together with guaranteed salary to be paid him, would be ample compensation for his supervision of the Los Angeles agency, and that while the collection fee would even-

tually cease, in the meantime Fooshe would, if successful, develop the Los Angeles agency and build up his income to approximately what it would have been had he continued at St. Louis.

OPINION.

Disney: It is the petitioner's position that the services for which the sum of money here involved was received were rendered in California, under the agreement by which he took over the Los Angeles agency, and therefore the money is community income; while the respondent argues that the money was received under a contract having its inception in a noncommunity state, and therefore the money is petitioner's separate property. There can be no doubt that the decline in petitioner's income which would ensue from acceptance of the Los Angeles agency was the reason for the waiver by the company of the imposition of its 2 percent collection fee; nor is there doubt that in order to secure the benefit of such waiver the petitioner must continue as a manager in the employ of the company. But does it follow therefrom that the moneys here involved constitute additional compensation for the services performed while the community existed in California? We find the question close and interesting, but after much consideration we come to the conclusion that the petitioner has [42] not shown the income to be earnings of petitioner while a member of a marital community in California. The answer depends largely upon whether what was done in Cali-

fornia constituted earning the income, or merely fulfillment of a condition inhering in a contract having its inception in another, noncommunity, state. Obviously, the income had a connection, not only with the original contract of 1919, but with that of 1938, resulting from the correspondence early in that year and prior to the contract of April 25, 1938, all outside the State of California.

The 2½ percent to which, before deduction of collection fee by the company, the petitioner was entitled, was based upon services rendered at St. Louis. The company waived the 2 percent collection fee prior to the services in Los Angeles, subject to a condition—rendition of managerial services (in Los Angeles as it transpired). We think that the inception of the earning was the old contract and services outside of California, and that there was, in California, only performance of the condition, and not earning of compensation without base in a noncommunity state. The waiver of the collection fee was, in our opinion, mere inducement, not an addition to compensation earned in California. If the earnings have their inception in a noncommunity state, there appears to be no requirement that nothing whatever can transpire in the community state without making the income that of the community. In Creamer v. Briscoe, 109 S. W. 911, the first community settled upon land and did everything required for homestead purposes, except to complete the time requirement as to possession. The wife died, the husband remarried and a second community completed

the necessary occupancy and secured the patent. The property was held to have been acquired by the first community. The authority seems well settled to the effect that performance in a community state of a condition involved in a contract made in a non-community state leaves the property noncommunity. In Sara R. Preston, 35 B. T. A. 312, we quoted McKay on Community Property, § 517, as follows:

* * * when a right, legal or equitable, is acquired whether before or during marriage, all things of value into which the initial right develops by the performance of conditions, the running of time or the like, or into which it is converted by an assignment, or if the initial right rests in obligation, all that which is obtained through the performance, discharge, satisfaction, enforcement or assignment of the obligation, are deemed in law to have been acquired as of the date of the acquisition of the initial right, and take the character, as separate or common, of that right.

Section 520 of the same work is quoted by us in John M. King, 26 B. T. A. 1158 (affd., 69 Fed. (2d) 639), as follows:

An inchoate title or pecuniary right is property in the sense of the law of separate and common property, just as truly as the most unimpeachable or perfect [43] title. It takes its rank as separate or common property, for the same reason, and in response to the same tests, as the perfect or complete title or right, and it retains its character as separate or common so long as it can be traced; *its development*

from an inchoate to the absolute or complete form does not shift it from one fund to another; it may be relieved of conditions and burdens but this does not change its character; it may pass from a conditional to an unconditional form, without change or legal character; it may be exchanged for other things or rights, and its character as separate or common passes to whatever was acquired by the exchange. If the property consists of an obligation, either contractual or delictual, it may be performed or enforced; and whatever is so acquired takes the same character as the obligation. (Italics supplied.)

We think that the petitioner herein had, prior to the inception of the community in California, an inchoate right which was property, albeit subject to condition, and that under the above authority the inception of the income was in the previous contract and services, and not the earnings in California. The rationale of the above quotations seems to have been consistently followed, though the circumstances differ. See William Semar, 27 B. T. A. 994; W. L. Honnold, 36 B. T. A. 1190; Albert J. Houston, 31 B. T. A. 188 (D. C. California) citing a number of cases. In our opinion, this proceeding involves, not additional compensation earned in California, but performance of a condition involved in the contract wherein the amounts involved have their inception. We therefore hold that the Commissioner did not err in including the entire amount in petitioner's income.

Decision will be entered for the respondent. [44]

United States Board of Tax Appeals
Washington

Docket No. 106640

CLAUDE R. FOOSHE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion, promulgated January 27, 1942, it is

Ordered and Decided: That there is a deficiency in income tax of $1,436.37 for the calendar year 1938.

Enter:

Entered Jan. 28 1942

[Seal] (Signed) R. L. DISNEY

Member. [45]

In the United States Circuit Court of Appeals
For the Ninth Circuit

BTA Docket No. 106,640

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes Now Claude R. Fooshe, by his attorney, John L. Wheeler, and respectfully shows:

I.

The petitioner on review is a citizen of the United States and is and has been since the 1st day of May, 1938, a resident of Pasadena, California. Petitioner files his individual income tax return (Form 1040) for the calendar year 1938 with the United States Collector of Internal Revenue at Los Angeles, California, whose office is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner of Internal Revenue returned deficiencies in income taxes against petitioner for the year 1938 [46] in the amount of $1,436.37, and on February 8th, 1941, in accordance with the provisions of the Internal Revenue laws, sent to petitioner herein a notice of such deficiency. On March 11th, 1941, petitioner filed with the United States Board of Tax Appeals his petition wherein he appealed from said notice of deficiency to said Board. The appeal bears docket No. 106,640.

The Board promulgated its opinion in the case on January 27th, 1942, the citation to which is 46 BTA #27, and entered its decision and final order thereon on January 28th, 1942, holding and deciding that

there was a deficiency in income tax of $1,436.37 for the calendar year 1938. The question in the case is: Was the major portion of the sum of $21,504.80 received from the Prudential Insurance Company of America while petitioner and his wife were residents of California, income to the marital community composed of petitioner and his wife, Lura D. Fooshe, or income to petitioner individually?

Petitioner, for many years, was manager of the St. Louis, Missouri, Agency of the Prudential Insurance Company of America, hereafter referred to as the "Company". Under his contract with the Company, petitioner received for a specified period 2½% of the premiums collected from the policies written in the Agency as part of his compensation for services as manager of the St. Louis Agency. In the event of the termination of the contract or collection of the [47] premiums in an agency of the Company not under supervision of petitioner, the Company imposed a 2% collection fee on the premiums from policies written in the agency. Thus, upon termination of the contract or collection of the premiums as aforesaid, the petitioner had the right to continue to receive for the specified period only ½% of the premium from policies written in the agency.

In 1938, petitioner relinquished the St. Louis Agency, and the contract under which he operated such Agency was terminated. He accepted the management of an ordinary Agency in Los Angeles, California, in which there was a considerably smaller volume of premiums collected and policies written

than was the case in the St. Louis Agency. He undertook the management of the Los Angeles Agency under a new contract with the Company, which provided a different basis of compensation than that provided in the St. Louis Agency contract.

The compensation afforded by the Los Angeles Agency contract on the basis of the volume of business then being done in that Agency was not equal to that received by petitioner in the St. Louis Agency. The Company, to induce petitioner to accept the Los Angeles Agency, agreed to supplement the income to be received under the Los Angeles Agency contract by waiving the 2% collection fee imposed by the Company, as set forth above, on the termination of the St. Louis Agency contract. [48]

On May 1st, 1938, petitioner took charge of the Los Angeles Agency under this new agreement. The additional income represented by the waiver of the 2% collection fee which was received by petitioner while he was acting as manager of the Los Angeles Agency and was a resident of California, constitutes the income in controversy in this proceeding. Petitioner treated it as income belonging to the marital community under the laws of California. Respondent held that it was the separate income of petitioner.

III.

The petitioner herein, Claude R. Fooshe, respectfully shows that he was aggrieved by the action of said United States Board of Tax Appeals and injured thereby, and that the errors complained of are as follows:

1. The Board of Tax Appeals erred in finding,

holding, and deciding that the major portion of the sum of $21,504.80 was the separate income of petitioner under the laws of California.

2. The Board of Tax Appeals erred in not finding, holding, and deciding that said income was the income of the community composed of petitioner and his wife, Lura D. Fooshe, under the laws of California.

3. The Board of Tax Appeals erred in construing the evidence as determining that said income was the separate income of the petitioner. [49]

4. The Board of Tax Appeals erred in that the conclusion of law arrived at, namely, that the income was the separate income of petitioner, is not supported by and is contrary to the findings of fact.

Wherefore, petitioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Respectfully submitted,

JOHN L. WHEELER

Attorney for Petitioner

1240 Pacific Mutual Building

Los Angeles, California [50]

(Duly Verified.)

[Endorsed]: U.S.B.T.A. Filed Apr. 23, 1942. [51]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To

General Counsel
Bureau of Internal Revenue
Treasury Department
Washington, D. C.

You are hereby notified that Claude R. Fooshe did, on the 23rd day of April, 1942, file with the Clerk of the United States Board of Tax Appeals in Washington, D. C. a Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above entitled case. A copy of the Petition for Review and Assignments of Error as filed is hereto attached and served upon you.

Dated this 21st day of April, 1942.

JOHN L. WHEELER
Attorney for Petitioner [52]

Personal service of the above and foregoing Notice, together with a copy of the Petition for Review and Assignments of Error mentioned therein is hereby acknowledged this 23rd day of April, 1942.

(s) J. P. WENCHEL,
Attorney for Respondent
on Review

[Endorsed]: U.S.B.T.A. Filed April 23, 1942. [53]

[Title of Circuit Court of Appeals and Cause.]

PRAECIPE

To B. D. Gamble, Clerk, United States Board of Tax Appeals:

Will you kindly prepare, in accordance with the laws and rules of said Court, a transcript of the record in the above entitled matter, such record to include:

1. Stipulation of Fact entered into between Claude R. Fooshe and the Bureau of Internal Revenue;

2. Exhibits A through H, submitted in connection with said Stipulation of Fact, and being all of the exhibits submitted in said proceeding;

3. Supplemental Stipulation of Fact; and

4. All other documents or matters of record in said proceeding submitted to the Board of Tax Appeals in said proceeding.

Dated: May 4th, 1942.

JOHN L. WHEELER
Attorney for Petitioner [54]

[Endorsed]: U.S.B.T.A. Filed May 6, 1942. [55]

[Title of Board and Cause.]

CERTIFICATE TO TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 55, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of July, 1942.

[Seal] B. D. GAMBLE,
Clerk, United States Board
of Tax Appeals.

[Endorsed]: No. 10204. United States Circuit Court of Appeals for the Ninth Circuit. Claude R. Fooshe, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 24, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit
Case No. 10204

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS ON APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Claude R. Fooshe, petitioner, by his attorney, John L. Wheeler, and respectfully shows:

I.

That petitioner on review adopts as his statement of points on which petitioner intends to rely on appeal the assignments of error set forth in Section III of petitioner's petition for review and assignments of error.

II.

Petitioner designates for printing the entire transcript of the proceedinge before the United States Board of Tax Appeals.

Dated: August 3rd, 1942.

Respectfully submitted,
JOHN L. WHEELER
Attorney for Petitioner

[Endorsed]: Filed Aug. 5, 1942. Paul P. O'Brien, Clerk.

No. 10204.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

JOHN L. WHEELER,
1240 Pacific Mutual Building, Los Angeles,
Attorney for Petitioner.

Parker & Baird Company, Law Printers, Los Angeles

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No. 10204.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Jurisdiction.

Petitioner filed his income tax return for the calendar year 1938 in Los Angeles, California. An asserted deficiency in income for that year in the amount of $1,436.47 was determined by the Commissioner of Internal Revenue. The Board of Tax Appeals affirmed the determination of the Commissioner. This case is before this Honorable Court on petition to review a decision of the United States Board of Tax Appeals under Section 1142 of Title 26, United States Code. The decision of the United States Board of Tax Appeals was entered January 28th, 1942. The petition was filed April 23rd, 1942.

Question Presented.

Whether certain sums of money received by petitioner during the period May 1st, 1938, to December 31st, 1938, from Prudential Insurance Company were community income to petitioner and his wife, Lura D. Fooshe, or separate income to petitioner.

Statement.

The facts were stipulated. [Tr. pp. 14-53.]

Petitioner and his wife, Lura D. Fooshe, were residents of and domiciled in the State of California from May 1st, 1938, to December 31st, 1938. [Stip. No. 19, Tr. p. 53.] They filed separate returns for the year 1938 with the Collector of Internal Revenue in Los Angeles. [Stip. No. 20, Tr. p. 53.]

During this period from May 1st, 1938 to December 31st, 1938, petitioner received certain sums of money totaling $21,504.80 from the Prudential Insurance Company of America (hereinafter referred to as the "Company"), which were reported by petitioner and his wife on their separate income tax returns as community income. [Stip. No. 20, Tr. p. 53.] The respondent has included the entire amount in the taxable income of the petitioner. [Stip. No. 9, Tr. pp. 16-17.]

Prior to May 1st, 1938, petitioner and his wife had lived in St. Louis, Missouri, where petitioner was manager of an Ordinary Agency of the Company. Petitioner had operated the St. Louis Agency of the Company under

a contract of employment dated August 4th, 1919* [Exhibit B, Tr. pp. 36-39], as amended by an agreement dated May 17th, 1927.* [Exhibit C, Tr. p. 40; Stip. No. 8, Tr. p. 16.] This contract as amended will be referred to as the St. Louis Agency contract. This contract provided, among other things, that petitioner was to act as manager of a certain designated territory in Missouri for the purpose of procuring applications for insurance, for the further purpose of collecting and paying over premiums to the Company, and performing such other managerial duties as the Company might require. [Sec. 1, p. 27, Ex. 1 hereof.] During the continuance of the contract, and only upon the express condition that the manager as such remain continuously in the employ of the Company, the manager received as compensation a commission on premiums based upon a schedule set forth in the contract. [Sec. 3, p. 28, Ex. 1 hereof.] This schedule provided for certain percentages of premiums paid in the first policy year and of renewal premiums paid in succeeding years. The commissions based on premiums in the first policy year are not involved here, and it was stipulated that under the contract the petitioner as manager was entitled to receive only 2½% of renewal premiums, the balance of the percentages provided for in the schedule in Section 3 being paid to agents working under the manager. [Stip. 9, Tr. pp. 16-17, and

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*The contract of August 4th, 1919 [Exhibit B, Tr. pp. 36-39] and the amendment of May 17th, 1927 [Exhibit C, Tr. p. 40] are set forth as Exhibits 1 and 2 hereof, respectively, inasmuch as the photostatic copies of the contracts in the transcript are difficult to read.

Stip. 15, p. 19.] For the collection of premiums of all policies for which no provision for compensation to the manager was made under the schedule of Section 3, the manager received a collection fee of 2% of the premiums, and on the other hand, if the premium of any policy covered by the contract was not collected by the manager, the Company charged a collection fee of 2% of the premium. This collection fee was deducted from the commission otherwise payable under the contract. [Sec. 4, p. 30, Ex. 1 hereof.]

Upon termination of the contract, the manager was allowed the commission upon renewal premiums, less the Company's collection fee of 2% of the premium. The number of years for which the manager would receive these commissions was dependent upon the cause of the termination and the length of service of the manager. [Sec. 6, p. 31, Ex. 1 hereof.] Thus, petitioner, upon termination of the contract, after deduction of the Company's collection fee of 2% of the premium, would be entitled to receive ½% of the renewal premium. [Stip. 14, Tr. pp. 18-19.] The contract also provided that upon its termination the compensation paid to the manager should be in full settlement of all claims under the contract and that all compensation which a continuance of the contract might have secured to him shall cease except as provided in the contract. [Sec. 21, p. 36, Ex. 1 hereof.]

The amendments effected by the agreement of May 17th, 1927, related to collection fees and terminal commissions. Certain modifications in the collection fee allowed the manager on group insurance and in certain other instances were made. Certain allowances were also made in connection with terminal commissions in some cases, not here material. Section B, which provided that

the Company would pay commissions on renewal premiums up to and including the tenth policy year, less a collection fee of 2% of the premium, was substantially a restatement of the first paragraph of Section 6 of the original agreement.

Petitioner continued to serve as manager of the St. Louis Agency until April 30th, 1938. On May 2nd, 1938, petitioner became manager of an Ordinary Agency of the Company in Los Angeles, California. Prior to the date on which petitioner became manager of the Los Angeles Agency, the St. Louis Agency contract was terminated. [Ex. F, Tr. p. 49.] The Company proposed that the petitioner operate the Los Angeles Agency under what was called "New Terms" manager's contract, which provided for a guaranteed monthly salary and certain commissions on first year premiums instead of the compensation derived from commissions and collection fees provided for in the St. Louis Agency contract.

The business in force in the St. Louis Agency was approximately 49 million dollars at the close of business December 31st, 1937, and over 5 million dollars of new insurance had been written in the St. Louis Agency under petitioner's supervision during the year 1937. [Stip. No. 10, Tr. p. 17.] At the close of business December 31st, 1937, there was in effect in the Los Angeles Agency approximately 29 million dollars of insurance, and approximately $800,000 in new insurance had been written in the Los Angeles Agency during the year 1937. [Stip. No. 11, Tr. p. 17.] With this volume of business in the Los Angeles Agency, petitioner would have suffered a substantial reduction in compensation in taking over the Los Angeles Agency under his New Terms contract with the proposed salary of $600 a month. [Stip. No. 12, Tr. pp.

17-18; Statement of George H. Chace, Tr. p. 52.] In order that petitioner should not suffer the deduction in compensation which would result from the New Terms contract as applied to the Los Angeles Agency, the Company agreed to relinquish its collection fee of 2% of the renewal premiums to which it was entitled upon the termination of the St. Louis Agency contract. Thus, instead of receiving ½% of the renewal premiums as provided upon the termination of the St. Louis Agency contract, petitioner would receive 2½% of the amount of the renewal premiums. [Stip. No. 14, Tr. pp. 18-19.] It was agreed that this would provide petitioner with ample compensation for the supervision of the Los Angeles Agency. [George H. Chace Statement, Ex. 14, Tr. pp. 51-52.] The petitioner and the Company exchanged letters confirming this arrangement. [Ex. D, Tr. pp. 41-44, and Ex. E. Tr. pp. 44-47.]

It should be stated here that the petitioner has conceded throughout the proceeding that the ½% of the renewal premiums which petitioner was entitled to receive in any event upon the termination of the St. Louis Agency contract, was separate income to him, and that the part of the $21,504.80 received by petitioner in California which this ½% represents was properly included by respondent in petitioner's taxable income. It is the part of the $21,504.80 represented by the relinquishment of the 2% collection fee which is in issue here. Petitioner's position is that these sums represent part of his compensation as manager of the Los Angeles Agency, and as such are community income.

Specifications of Error to Be Urged.

The Board of Tax Appeals erred:

1. In finding, holding and deciding that the major portion of the sum of $21,504.80 was the separate income of petitioner under the laws of the State of California.

2. In not finding, holding, and deciding that said income was the income of the community composed of petitioner and his wife, Lura D. Fooshe, under the laws of the State of California.

3. The Board of Tax Appeals erred in construing the evidence as determining that said income was the separate income of the petitioner.

4. The Board of Tax Appeals erred in that the conclusion of law arrived at, namely, that the income was the separate income of petitioner, is not supported by and is contrary to the findings of fact.

Summary of Argument.

In demonstrating that the sums of money received by petitioner during the period from May 1st, 1938, through December 31st, 1938, by reason of the relinquishment by the Prudential Insurance Company of its 2% collection fee on certain renewal premiums collected in the St. Louis Agency were community income, petitioner will develop three propositions:

A. Upon termination of the St. Louis Agency contract, by its express terms and under settled principles of law, petitioner did not have any claim or right of any

kind to the collection fee on renewal premiums. The collection fee was the agreed measure of compensation for services rendered in collecting the premiums under the contract and was received by the party performing the collection service. Upon termination of the contract petitioner had no further right to perform the service or receive the collection fee. Services rendered in writing the policy of insurance were compensated for by the payment of the ½% commission which was received by petitioner irrespective of the collection fee.

B. Sums received by petitioner by reason of the relinquishment of the Company's 2% collection fee represented part of the compensation for petitioner's services as manager of the Los Angeles Agency. These sums were received under the agreement entered into between the Company and petitioner for his employment as manager of the Los Angeles Agency.

C. That the character of income as community or separate under the laws of California is to be determined in accordance with the laws of the husband's domicile at the time the income is earned. Income is earned under this rule of law at the time the services for which the income is received, are performed. Thus inasmuch as the services were rendered in California at a time when petitioner was domiciled here, under this settled rule of law, the sums received by petitioner as a result of the relinquishment of the Company's 2% collection fee were community income.

ARGUMENT.

I.

Upon Termination of the St. Louis Agency Contract, by Its Express Terms and Under Settled Principles of Law, Petitioner Did Not Have Any Claim or Right of Any Kind to the Collection Fee on Renewal Premiums.

While petitioner was manager of the St. Louis Agency, his rights to compensation for the services he performed were determined by the contract of August 4th, 1919, as amended May 17th, 1927, referred to herein as the St. Louis Agency contract. [Exhibits 1 and 2 hereof.] Under this contract, his employment was to act as manager.

> "for the purpose of procuring applications for Ordinary Insurance in the said Company, with premiums payable annually, semi-annually, or quarterly, and *for the further purpose of collecting and paying over premiums to the company in cash on such insurance when effected,* and of performing such other duties in connection therewith as may be required by said company;" [Sec. 1, p. 27, Ex. 1 hereof.] (Italics ours.)

Petitioner's duty as manager to collect and pay over premiums is here emphasized inasmuch as it clearly appears from other provisions of the contract that the portion of his compensation represented by the company's 2% collection fee here in question, when received by him under the contract, was compensation for services he performed in collecting and paying over the premiums. Thus, Section 4 provides that after the expiration of the period for which provision for commissions is made in Section 3

(15 years as to regular policies and 6 years as to intermediate policies)

> "the manager shall be entitled to a collection fee of 2% of such premiums, but the payment of such collection fees shall be subject to discontinuance at any time in the event of the Company making other arrangements for the collection of the premiums, and, if not previously discontinued, shall cease upon the termination of this contract."

The allowance of the 2% collection fee to the manager in such cases is clearly compensation for the services performed in making the collection. Paragraph 2 of Section 4 provides:

> "Provided, however, that when premiums, either first or renewal, on policies issued under this contract are collected *other than by the manager* during the continuance of this contract, a collection fee of 2% of such premiums shall be deducted from the commission to be allowed as provided in Section 3." (Italics ours.)

This paragraph, providing as it does, that if the premium on any policy is not collected by the manager, a collection fee of 2% of the premiums shall be deducted from the amount received by the manager, clearly indicates that the 2% of the premium received by the manager when the premium is collected by him represents compensation for his services of collection.

Paragraph 3 of Section 4 provides:

> "Provided, further, that on premiums on business not issued by or through the Manager but transferred to him for collection, he shall be allowed a collection fee of 2% of the premiums, which collec-

> tion fees, however, may be discontinued at any time in the event of the Company making other arrangements for the collection of the premiums."

With this provision the possibilities that might arise in connection with the collection of premiums are completely covered and it demonstrates beyond any doubt that the 2% collection fee represents compensation for the collection of the premiums. The right to receive the 2% collection fee clearly arises from the performance of the duties involved in collection of premiums and does not arise from the writing of the policy. The petitioner did not have any right or claim of any kind to the collection fee by reason of the policy of insurance having been written in his agency inasmuch as the collection fee was earned each year in which it was paid through the performance of the collection services.

Thus, if the St. Louis Agency contract had not been terminated and the petitioner had transferred to the Los Angeles Agency, he would not have received the 2% collection fee on premiums of policies of insurance written while he was manager of the St. Louis Agency. He would only have been entitled to a collection fee of 2% on the premiums being collected in the Los Angeles Agency.

Inasmuch as the petitioner as manager was entitled under the St. Louis Agency contract to receive only 2½% of the renewal premiums collected (the balance of the percentage set forth in Section 3 being paid to the agent [Stip. No. 15, Tr. p. 19]), the petitioner as manager would only have had the right to receive ½% of the renewal commission if the renewal premium was not collected under his supervision. [Sec. 4, p. 30, Ex. 1, hereof.] [Stip. No. 14, Tr. pp. 18-19.]

The St. Louis Agency contract, however, was terminated, effective on April 30th, 1938. [Ex. F, Tr. p. 49.] Originally petitioner's rights upon termination of the contract of August 4th, 1919 were determined by Section 6. [Sec. 6, Ex. 1 hereof.]

Section 6 was amended by the provisions of the agreement of May 17th, 1927 relating to terminal commissions. [Ex. 2 hereof.] Inasmuch as the contract was not terminated under the conditions of Paragraphs a or c of the provisions relating to terminal commissions in this agreement, the rights of the petitioner are to be determined by Paragraph b. The right to commissions based on the premiums of policies written in the St. Louis Agency under his supervision was absolutely dependent upon this provision. He did not have any inherent right or claim, either legal or equitable, in or to commissions or collection fees on renewal premiums except as therein provided.

Wagner v. Land, 152 Okla. 225, 4 Pac. (2d) 81;

Fabian v. Provident Life & Acc. Ins. Co., 5 Fed. Supp. 806;

Locher v. New York Life Ins. Co., 200 Mo. App. 659, 208 S. W. 862;

Arensmeyer v. Metropolitan Life Ins. Co., 254 Mo. 363, 162 S. W. 261;

Nelles v. MacFarland, 9 C. A. 534, 99 Pac. 980;

Walker v. John Hancock Life Ins. Co., 80 N. J. L. 342, 79 Atl. 354;

79 *A. L. R.* 475;

136 *A. L. R.* 160.

In *Wagner v. Land, supra*, a sub-agency contract between Land, a manager of the Prudential Insurance

Company, and an agent, Wagner, was before the court. While the provisions of that contract were identical in many respects with the St. Louis Agency contract, the right of the sub-agent to receive commissions after the termination of the contract was limited to first year commissions less the collection fee of 2%. Wagner, the agent, sued the manager for renewal commissions after the termination of the agency. The court held that the agent had no right to such commissions. The court stated that under that contract the right to renewal commissions was dependent upon the continuance of the contract. The court emphasized the provisions of the contract which is to be found as Section 21 in the St. Louis Agency contract. [Ex. 1 hereof.] This section provides that the compensation paid to the manager shall be in full settlement of all claims and demands in favor of the management under the contract and that he shall have no other rights to compensation which a continuance of the contract might have secured to him.

Nelles v. MacFarland, supra, also involves a contract between a manager of Prudential Insurance Company and a sub-agent.

Locher v. New York Life Insurance Co., supra, is one of the leading cases and states the rule as follows (208 S. W. 862, 866):

> "The right of the agent to commissions on renewals collected or falling in after the end of his agency can rest only on express terms in his contract, or be necessarily drawn from an interpretation of that contract as a whole. This must be so for the right to commissions on renewals rests, in part, on the consideration of the services by the agent to the company in keeping the policies written by him alive."

In the St. Louis Agency contract, the parties had placed a definite value on the services of the manager for collecting the premiums and keeping the policies in force. This was the 2% collection fee.

The lack of any right of the agent to the collection fee or renewal commissions is very neatly raised in *Walker v. John Hancock Life Insurance Co., supra.* In that case, under his contract the agent received an amount equal to nine times the first premium for writing the policy and a 20% commission for collecting the premiums. The contract was cancelled by the company and the agent sued for damages suffered as a result of his being deprived of his "right" to continue to make collections and receive his 20% commission. The court held that he had no right to continue to collect the premium from the fact of the writing of the policy or otherwise than as provided in his contract. Judgment for the company was affirmed.

Thus, the petitioner had no right or claim in or to the portion of the renewal commissions represented by the 2% collection fee, nor did the portion of the renewal commission represented by the collection fee reflect work or services which petitioner had performed in any way. The collection fee was not earned and the services for which it was compensation were not rendered until the collection of the premium was made by the manager.

The Board of Tax Appeals was of the opinion that

> "the 2½% to which, before deduction of collection fee by the company, the petitioner was entitled, was based upon services rendered at St. Louis." [Tr. p. 67.]

The error of this statement is obvious. The petitioner was not entitled to 2½% without deduction of the 2%

collection fee unless he performed the services in St. Louis of collecting the premiums. Upon termination of the contract, petitioner had no right whatever to the amount represented by the collection fee, first, because his contract expressly so provided, and secondly because he could not perform the service of collecting the premium for which the collection fee was compensation. Petitioner's only right, based upon services rendered in St. Louis, was to the ½% which was payable to petitioner after the termination of the contract, and was not dependent upon the rendering of the service of collecting the premium. This ½% was based upon services rendered in St. Louis in writing the policy and under the contract it was the full measure of his compensation for such service. The error contained in the statement made by the Board of Tax Appeals is the error of its decision.

II.

Sums Received by Petitioner by Reason of the Relinquishment of the Company's 2% Collection Fee Represented Part of the Compensation Earned by Petitioner in California.

In the early part of 1938 negotiations were commenced between petitioner and the Company with reference to petitioner's taking over the Los Angeles Agency. The question of compensation was paramount inasmuch as the St. Louis Agency was at that time a larger agency than the one in Los Angeles. The insurance in force in the St. Louis Agency was approximately 49 million dollars, and in the prior year new business in an amount exceeding 5 million dollars had been written. [Stip. No. 10, Tr. p. 17.] Insurance in force in the Los Angeles

Agency amounted to approximately 29 million dollars, and approximately $800,000 of new business had been written in the prior year. [Stip. No. 11, Tr. p. 17.] It also appeared that the Company had changed its managerial contracts to what is referred to as a "new terms" contract.

The manager's contract [Ex. A, Tr. pp. 20-35], is a "new terms" contract. It provides for a minimum guaranteed salary and certain commissions on first year premiums. No collection fees and no commissions on renewal premiums are allowed, as was the case in the St. Louis Agency contract. The taking of the Los Angeles Agency under this "new terms" contract would have resulted in a substantial decrease in petitioner's compensation. [Stip. No. 12, Tr. p. 18.]

The considerations affecting the action of the parties in the negotiations and the agreement which resulted are set forth in the statement of Mr. Chace, Vice-President of the ordinary agencies of the Company. He indicates that Mr. Fooshe would have suffered a substantial reduction in income by taking the Los Angeles Agency under the "new terms" contract with the guaranteed salary of $600 a month then tentatively proposed. The Company, however, did not feel that it could undertake to guarantee the substantially larger salary that would have been required to make Mr. Fooshe's compensation in the Los Angeles Agency under the "new terms" contract equal that which he received under the St. Louis

Agency contract. In this situation, it was agreed that petitioner should receive a guaranteed salary of $600 a month and receive additional sums measured by the amount which relinquishment by the Company of its 2% collection fee on renewal premiums payable on business issued through the St. Louis Agency would represent.

This arrangement was satisfactory inasmuch as petitioner would receive an amount comparable to that which he received in the St. Louis Agency at the time he took over the Los Angeles Agency. The compensation derived from the collection fee would diminish as it was computed upon renewal premiums received through the tenth year of the life of the policy. Manifestly, the intention of the parties was that the sums measured by the Company's 2% collection fee would constitute compensation for services performed in the Los Angeles Agency in addition to the salary and the amount in first year commissions the volume of business in that agency would produce until petitioner had developed the agency to a point where his earnings under the "new terms" contract would equal his earnings under the St. Louis Agency contract.

Mr. Chace expressed this intention thus:

> "It was felt by waiving this 2% collection fee that the amount that would accrue to Mr. Fooshe, together with the guaranteed salary to be paid him, would be ample compensation for the supervision of the Los Angeles Agency." [Ex. H, Tr. p. 52.]

On February 23rd, 1938, petitioner sent a letter to Mr. Chace, expressing this agreement. [Ex. D, Tr. pp.

41-44.] Petitioner's expression of his understanding of the agreement is contained in the postscript [Tr. pp. 43-44]:

> "I understood I would receive the full renewals same as had I remained here, only the company will bear the expense for collecting to the tenth year. I presume all of this is set out in a letter so will leave it all to you."

To which Mr. Chace replied under date of February 24th, 1938 [Ex. E, Tr. pp. 44-47]:

> "Referring to your postscript, you are correct in your understanding that full renewals will be paid on the business in the St. Louis Agency after the termination of the 'Old Terms' contract, just as though the contract remained in force. In other words, no collection fee will be imposed on the business for which you have qualified for renewal commissions. Naturally, the collection fee that you would receive if you remained in St. Louis under the Old Terms contract on business on which your renewal business has expired, would be discontinued."

In other words, petitioner was to receive the 1/2% to which he was entitled in any event upon the termination of the contract, and in addition thereto, the 2% represented by the Company's collection fee. The Company was, in effect, engaging services to be rendered in Los Angeles in managing the Los Angeles Agency, in lieu of services to be rendered in collecting the renewal premiums in the St. Louis Agency.

III.

The Character of Income as Community or Separate Under the Laws of California Is to Be Determined in Accordance With the Laws of the Husband's Domicile at the Time the Income Is Earned.

Fundamentally, there is no dispute as to the facts in this proceeding. The error arises in the application of legal principles to the facts which were stipulated and incorporated by the Board of Tax Appeals in its Findings of Fact.

The first error was as has already been stated, in concluding that the petitioner had any right or claim, legal or equitable, in or to the 2% collection fee upon the termination of the contract in the face of the well-established rule of law to the contrary. The second error is as to the law of community property and income.

That the character of income as community or separate under the laws of California is to be determined in accordance with the laws of the husband's domicile at the time the income is earned is well settled.

U. S. v. Malcolm, 282 U. S. 792;

Commissioner v. Cavanaugh, 125 Fed. (2d) 336, (C. C. A. 9);

Devlin v. Commissioner, 82 Fed. (2d) 731, (C. C. A. 9);

W. L. Honnold, 36 B. T. A. 1190;

Sarah R. Preston, 35 B. T. A. 312;

Gouverneur Morris, 31 B. T. A. 178;

California Civil Code, Sec. 161 A;

California Civil Code, Sec. 162;

California Civil Code, Sec. 163;

California Civil Code, Sec. 164.

These cases likewise clearly establish the rule of law that income is earned at the time the service or work for which income is received is performed.

In its opinion [Tr. pp. 66-69], the Board of Tax Appeals cites the cases of *Sarah R. Preston, supra; John M. King,* 26 B. T. A. 1128 (Aff. 69 Fed. (2d) 639); *William Semar,* 27 B. T. A. 494; *W. L. Honnold, supra,* and *Albert J. Houston,* 31 B. T. A. 188, as establishing the doctrine of inchoate rights with reference to community income property. The doctrine of inchoate rights is well established. The Board of Tax Appeals failed to perceive, however, that the very cases it cited established two corollary propositions which require a conclusion contrary to that reached by the Board.

The first corollary is that the inchoate right must be legal or equitable in character. The second corollary is that performance of the services for which the income is received is that which gives rise to the right, inchoate or otherwise, to the income.

Thus, in *Sarah R. Preston, supra,* which involved the determination of the community or separate character of legal fees received after the date on which the wife acquired a vested interest in community income in California, the Board of Tax Appeals expressly pointed out (p. 323):

> "Preston performed services for which he received a part of the Herminghaus fee prior to July 29,

> 1927, the effective date of section 161 (a) of the Civil Code of California. *He performed no services under the contract after that date.* Since Preston would have been taxable upon the fees if they had been received prior to the effective date, he is likewise taxable upon those received after that date; for the amendment to the Civil Code did not serve to change separate property into community property." (Italics ours.)

Similarly, as to the quotation from McKay on *Community Property,* Section 517, (set forth in the *Preston* case and requoted by the Board in its opinion in the instant case [Tr. p. 68]), in which the doctrine of inchoate rights is expressed, reference to McKay's complete statement of the doctrine in Section 517 discloses the premise upon which the quoted passage is based:

> "The reader should notice that it is assumed the initial right of the series is of such a character that it is recognized as valid in law or equity and is available against some one. It must be more than a mere unenforceable claim." (*McKay, Community Property,* Second Edition, p. 352.)

As it has been demonstrated, petitioner had no right or claim of a legal or equitable nature in or to the 2% collection fee upon the termination of the St. Louis Agency contract. Therefore, his right to the sums received by reason of the relinquishment of the 2% collection fee by the Company could not have their inception in the St. Louis Agency contract, as the Board of Tax Appeals states, under any proper application of the doctrine of inchoate rights. The services which gave rise to the right to receive the sums measured by the 2% collec-

tion fee were those performed in California as manager, and the contract in which this right had its inception was petitioner's agreement of employment for the Los Angeles Agency. These services were not the "condition" of the receipt of the moneys. They were the *sine qua non,* that gave rise to his right to the money.

If the statements of the Board of Tax Appeals are correct and the rendering of services under a contract of employment is only "compliance with a condition" the precedent of all prior cases is swept away and there is a new community property law under which the character of income as separate or community is to be determined by the law of the state where the contract was entered into and not by the laws of the state of the domicile of the husband at the time the services are performed. Community property states would become the situs for the making of all contracts and the present trend in tax collections would be reversed. Conversely the community interest of a wife could be fraudulently defeated by the making of a contract in a noncommunity property state. This cannot be and is not the law. The error is obvious. The performance of services is that which gives substance to the right to income and the character of the income as community or separate is fixed at the time the services are rendered.

Similarly in *William Semar, supra,* the services which gave rise to Semar's right in the corporation had all been performed and completed prior to his marriage, although he had not completed his acquisition of the interest in the corporation to which his services gave him a right. It was therefore held that his interest in the company was his separate property.

And in the *Honnold* case, *supra*, the services had all been performed in New York while petitioner was a resident of that state. It was expressly stated in the opinion that petitioner was not rendering and had not rendered any services to the company while domiciled in California in which would form any basis for the right to the corporate disbursement he received.

Likewise in the *Houston* case, *supra*, the petitioner's services had all been performed prior to his marriage, although the money was received after this event. It was therefore held that the moneys received were his separate property.

In the *John M. King* case, *supra*, involving the community or separate character of an attorney's contingent fee which was received after the death of the taxpayer's wife, the Circuit Court of Appeals held that the contingent fee was community income. It appeared that while the greater part of the services had been rendered under the contingent contract prior to the death of the taxpayer's wife, some services had been rendered after her death. The court treated the contingent fee contract as an entirety in determining that it was community in character. It was expressly noted by the court, however, that the parties had not raised the question as to whether a deduction should not have been made from the community income of the taxpayer's wife because of the services and expenses of the taxpayer after her death. Thus, while the contract before the court was truly dependent upon a condition: *i. e.* successful outcome of litigation, the court expressly limited its decision by noting that the services under such a contract, although the contract itself must be treated as an entirety, might give rise to distinct community or separate interest.

In the instant case, petitioner, having no rights whatever in the 2% collection fee upon the termination of the St. Louis Agency contract, entered into a contract which gave him a right to receive the sums of money measured by the 2% collection fee by performing services of manager in the Los Angeles Agency.

Further examination of the cases cited, *supra,* would only be to belabor the rule of law uniformly applied in determining the character of income derived from the rendering of services, namely, that the character of the income is determined at the time the services are performed. The services having been performed in California at a time when petitioner was domiciled in California, the income derived therefrom must be community income.

Conclusion.

It clearly appearing that the petitioner had no claim or right, either legal or equitable, in or to that part of the $21,504.80 represented by the moneys derived by the Company from its 2% collection fee upon the termination of the St. Louis Agency contract; it further appearing that such moneys were paid to petitioner for managerial services performed in the Los Angeles Agency under a contract of employment calling for such services, the conclusion under well settled principles of law is inescapable that such sums were earned by petitioner at a time when he was domiciled in California and consequently constituted income to the community of petitioner and his wife, Lura D. Fooshe, under California law.

As to that portion of the $21,504.80 represented by moneys derived by the Company from its 2% collection fee and paid to petitioner during the period from May 1st, 1938 until December 31st, 1938, the determination of the Commissioner of Internal Revenue was erroneous and the decision of the Board of Tax Appeals affirming the Commissioner's determination was likewise founded in error.

It is therefore respectfully submitted that an order be entered setting aside the decision of the Board of Tax Appeals and requiring the Commissioner to make a re-determination in accordance with the law. Inasmuch as petitioner has already paid the full amount of the deficiency assessed by the Commissioner during the course of this proceeding, the further order of this court is requested requiring repayment of such part of the payment as may be due petitioner under the rule of law in this case, together with interest thereon.

Respectfully submitted,

JOHN L. WHEELER,

Attorney for Petitioner.

APPENDIX.

THIS CONTRACT, made this Fourth day of August, 1919, by and between THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, of Newark, N. J., party of the first part, and CLAUDE R. FOOSHE, of ST. LOUIS, in the County of ST. LOUIS and State of MISSOURI, party of the second part.

WITNESSETH: That the said parties, in consideration of the sum of one dollar each to the other in hand paid, and of the covenants and agreements hereinafter mentioned, hereby mutually covenant and agree, each with the other, as follows, to wit:

Section 1. That the said party of the first part, hereinafter designated as the Company, doth hereby appoint the said party of the second part, hereinafter designated as the Manager, as Manager for the following territory: Missouri east of and including counties of Putnam, Sullivan, Linn, Chariton, Howard, Boone, Moniteau, Morgan, Camden, Dallas, Webster, Douglas and Ozark, for the purpose of procuring applications for Ordinary Insurance in the said Company with premiums payable annually, semi-annually or quarterly, and for the further purpose of collecting and paying over premiums to the Company in cash on such insurance when effected, and of performing such other duties in connection therewith as may be required by said Company; and that this contract shall be treated as strictly confidential.

Section 2. That the Manager shall devote his entire time, talents and energies to the business of the Com-

pany and appoint agents in the territory named, for whose fidelity and honesty he shall be held responsible.

Section 3. That during the continuance of this contract and only upon the condition that the Manager, as such, remains continuously in the employ of the Company the compensation to be allowed the Manager shall be a commission on premiums when collected and paid to the Company in cash on policies written by or through him under this contract, as follows:

Regular Policies	Per Cent. of Premiums in the First Policy Year	Per Cent. of Premiums in the Second to the Tenth Policy Year, Inclusive	Per Cent. of Premiums in the Eleventh to the Fifteenth Policy Year, Inclusive
Whole Life	50	7½	5
30-Payment Life	45	7½	5
25-Payment Life	45	7½	5
20-Payment Life	40	7½	5
15-Payment Life	35	7½	5
10-Payment Life	30	7½	
5-Payment Life	15	7½	
30-Year Endowment	40	7½	5
25-Year Endowment	35	7½	5
20-Year Endowment	30	7½	5
15-Year Endowment	25	5	5
10-Year Endowment	20	5	
5-Year Endowment	10	5	
20-Payment 30-Year Endowment	35	7½	5
15-Payment 30-Year Endowment	35	5	5
15-Payment 25-Year Endowment	30	5	5
15-Payment 20-Year Endowment	25	5	5
10-Payment 25-Year Endowment	25	5	
10-Payment 20-Year Endowment	25	5	
10-Payment 15-Year Endowment	20	5	
20-Pay Pay't Life Pure End't Addition at end of 20 Years	40	7½	5
10-Year Term	30	7½	
Preliminary Term (Commission not allowed until regular premium is paid)	7½		
Single-Payment	5		
Annuity	2		
Extra Premiums	5		
One Year Renewable Term Group Insurance	10	5	

Intermediate Policies	Per Cent. of Premiums in the First Policy Year	Per Cent. of Premiums in the Second to the Sixth Policy Year, Inclusive
Whole Life	35	5
20-Payment Life	30	5
15-Payment Life	25	5
10-Payment Life	25	5
20-Year Endowment	30	5
15-Year Endowment	20	5
10-Year Endowment	15	5

Section 4. That on renewal premiums for the sixteenth and subsequent policy years, on Regular policies and for the seventh and subsequent policy years on Intermediate policies collected through his agency, on new business effected by or through the Manager under this contract, the Manager shall be entitled to a collection fee of two per cent (2%) of such premiums, but the payment of such collection fees shall be subject to discontinuance at any time in the event of the Company making other arrangements for the collection of the premiums, and, if not previously discontinued, shall cease upon the termination of this contract.

Provided, however, that when premiums, either first or renewal, on policies issued under this contract are collected otherwise than by the Manager during the continuance of this contract, a collection fee of two per cent (2%) of such premiums shall be deducted from the commission to be allowed as provided in Section 3.

Provided further, that on premiums on business not issued by or through the Manager, but transferred to him for collection, he shall be allowed a collection fee of two per cent (2%) of the premiums, which collection fees, however, may be discontinued at any time in the event of the Company making other arrangements for the collection of the premiums.

Section 5. That if this contract shall be terminated for any cause, except violation of its conditions, the commissions on the balance of the first year's premiums on policies issued through the Manager remaining unpaid at the termination of this contract, shall be payable to the Manager, his executors, administrators or assigns, subject to the conditions of Section twenty-three (23).

Section 6. That if this contract shall be terminated for any cause other than violation of its conditions, or the death of the Manager, and the Manager has been continuously in the service of the Company for two or more years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent (2%) of such renewal premiums, until the commissions on the premiums in the tenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated by the death of the Manager and if he has been continuously in the service of the Company for two or more years, the Company will continue to pay to his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent (2%) of such renewal premiums, until the commissions on the premiums in the fifteenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions before the Manager shall have been continuously in the service of the Company for two years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums as set forth in Section three (3) less a collection fee of two per cent (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions, the Company will continue to pay to the Manager, his executors, administrators, or assigns, the commissions upon renewal premiums on Intermediate policies as set forth in Section three (3) less a collection fee of two per cent (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

Section 7. That if the Manager shall at any time violate any of the conditions of this contract, he shall forfeit all commissions which would thereafter have became payable under this or any previous contract.

Section 8. That if the Manager, at any time after the notice of the termination of this contract, shall take any action toward inducing the agents of the Company to leave its service, or make any attempt to induce its policyholders to relinquish their policies he shall forfeit all commissions which would thereafter have become payable under this or any previous contract.

Section 9. That no commission shall be paid to the Manager on any policy after it has been canceled or become paid-up. But if the Manager, while in the employ of the Company under this contract, shall secure the revival of any policy issued under this contract, after such policy has been canceled, he shall be entitled to the commission on such policy as provided in Sections three (3) and four (4) as though policy had not been canceled.

Section 10. That the Company may make any changes in its methods of conducting its business, may divide the

territory heretofore mentioned and make any other appointments therein.

Section 11. That the Manager shall not insert or authorize the insertion of any advertising matter in any publication whatever, or issue or circulate or authorize the issuing or distribution of any circulars or papers, or write or authorize the writing of any letters to any publication respecting any life insurance company, and that the Manager shall not use or authorize the use of language, orally or in writing, respecting any company tending to bring such company into disrepute.

Section 12. That the Manager shall send to the Company *an exact copy* of all contracts and amendments thereto entered into with agents; that when contracts are terminated, the Manager shall notify the Agent by letter of such termination and shall immediately send to the Company a copy of such letter together with termination form; that such agent shall have no claim against the Company, but in case of the termination of this contract the Company may and is empowered to carry out at its option any agreements as to the payment of renewal commissions contained in the contracts of any agents which may have been terminated by the termination of this contract, and that all payments made to agents by the Company on account thereof shall be deducted from the amounts payable to the Manager, his executors, administrators or assigns, by the terms of this contract; that the Manager shall in no case make a contract with an agent providing for greater compensation than that provided for in this contract; that the Company will not approve any contract between the Manager and an agent in which renewal commissions on Regular policies have been al-

lowed beyond the tenth year of insurance or in which renewal commissions on Intermediate policies have been allowed beyond the sixth year of insurance. And the Manager further agrees to promptly terminate any contract or agreement with an agent when requested by the Company so to do.

Section 13. That the branch office occupied by the Manager shall be subject to the Company's control. If a written lease is required, it must be in the Company's name and a copy filed at the Home Office, and the Manager shall not negotiate a lease unless authorized in writing by the Company so to do. In case there is no written lease, the office is to be wholly under the control of the Company. These conditions apply whether the Manager or the Company pays the rent.

Section 14. That the Manager shall be governed in the business of his Agency by the written and printed instructions and rules which he may from time to time receive from the Company; that he shall keep correct accounts and records of all business done and moneys collected, and that all books, accounts, documents, vouchers and other papers connected with the business of the Company are and shall be its property, and at any time open to the inspection and examination of its authorized representative; and that the Manager shall report to the Company in writing, at such times as he may be instructed so to do the collection of all premiums on policies and receipts sent to him for collection to the date of such accounting.

Section 15. That all moneys or securities received or collected for or on behalf of the Company, after making such deductions as are herein allowed, shall be held by the

Manager as a fiduciary trust, and shall not be used by him for any purpose whatsoever, except as herein specifically authorized, but shall be immediately deposited, in a bank designated by the Company, to the credit of The Prudential Insurance Company of America, or shall be paid over to such person as the Company may designate.

Section 16. That the Manager shall not incur or authorize the incurring of any expense or expenditure whatever on account of this Company without the written authority of the Company.

Section 17. That the Manager has no authority on behalf of the Company to make, alter or discharge any policy, to extend the time for paying a premium, to waive forfeitures, to incur any liability on behalf of the Company, to allow the delivery of any policy unless the applicant be in good health and the first premium paid in full, or to receive any money due or to become due to the Company except on policies and renewal receipts signed by the President, one of the Vice Presidents or the Secretary of the Company and sent to him for collection.

Section 18. That, unless otherwise, terminated, this contract may be terminated by either party by a notice in writing delivered personally, or mailed to the other party at the last known address, at least thirty days before the date therein fixed for such termination. In case the Manager fails to comply with any of the duties, conditions or obligations of this contract, the Company may terminate same upon immediate notice.

Section 19. That when policies issued under this contract are changed and allowance is made on an old policy and applied on a new policy, no commission shall be paid on the amount thus allowed, unless authorized by the

Company; that if the Company shall return premiums on a policy issued under this contract, the Manager shall repay to the Company, on demand, the amount of commissions received on the premiums so returned.

Section 20. That no assignment of commissions earned or accrued or to accrue under this contract shall be valid unless authorized in writing by the Company.

Section 21. That if this contract be terminated, the compensation paid to the Manager, with the amount then due him under this contract, shall be in full settlement of all claims and demands in favor of the Manager under this contract, and that all compensation which a continuance of this contract might have secured to him shall be forfeited, except as herein provided.

Section 22. That the Manager shall not pay or allow, or offer to pay or allow, as an inducement to any person to insure, any rebate of premium or any inducement whatever not specified in the policy.

Section 23. That the Company shall have and is hereby given a first lien upon any commissions or claims for commissions under this or any prior contract, as security for the payment of any claims due or to become due to the Company from said Manager; and the Manager shall pay interest on any outstanding indebtedness at the rate of five per cent (5%) per annum, the interest to be computed at the end of each contract year on the average indebtedness existing during such year.

Section 24. That when a policy issued under this agreement is the cause, directly or indirectly, of the cancelation of a policy previously issued by the Company, the Company reserves the right to adjust the payment of com-

missions as the circumstances of the case seem to warrant.

Section 25. That no compensation shall be allowed on any premium, or portion thereof, payment of which is waived because of the Disability clause contained in the policy.

Section 26. That this contract shall take effect on the Fourth day of August, 1919, when signed by the Manager, and executed on behalf of the Company by the President and one of the Vice-Presidents or by the President and the Secretary.

In Witness Whereof, the parties to this contract have executed the same in duplicate on the day and year first above written.

The Prudential Insurance Company of America
Party of the First Part

By

Forrest F. Dryden, President
Edward Gray, Vice President
Claude R. Fooshe,
Party of the Second Pt

Countersigned by
Hno. H. Rudett
Asst. Secretary

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Incorporated under the laws
of the State of New Jersey

Edward D. Duffield, Pres.

Home Office, Newark, New Jersey

IT IS HEREBY AGREED by and between The Prudential Insurance Company of America, and C. R. FOOSHE, Manager for the said Company, that in consideration of the surrender by each of the said parties of their respective rights under all provisions in the existing contract, as heretofore amended, between the said Company and the said Manager concerning the payment of collection fees and the payment of commissions after termination of said contract, as heretofore amended, such provisions are hereby repealed and terminated as of the date of the execution of this agreement, and in place thereof the following provisions are hereby substituted effective from the date hereof.

COLLECTION FEES.

That after commissions, upon policies written by or through said Manager, are no longer payable under the contract, as heretofore amended, of which this is an amendment, and as amended hereby, and hereinafter referred to as this contract, the said Company shall pay to the said Manager a collection fee of two per cent, (2%) of the premiums of all such policies and upon premiums of all policies transferred to him for collection, when in either case such premiums are collected by or through him, excepting that such collection fee on premiums in any policy year on group insurance policies shall be two per cent (2%) of the first $50,000 of the premiums of each

such policy, and one per cent (1%) on the next $150,000 of premiums of each such policy, but no collection fee shall be payable on any part of such premium which is in excess of $200,000; nor, except as hereinafter provided, shall a collection fee be paid to said Manager upon any premiums when collected by or through his agency under this contract concerning which said Company has waived, by agreement, its right to deduct any collection fee from the commissions payable to some other Manager or his estate, where such waiver is in accordance with the agreement of said Company with such other Manager; and only one per cent (1%) collection fee shall be payable to said Manager on any premiums concerning which the Company has agreed to deduct but one per cent (1%) from the commissions payable to some other Manager or his estate.

Terminal Commissions

That if this contract be terminated the compensation to be paid the Manager thereafter shall be:

(a) If terminated by the death of the Manager, his retirement at age 65 or later, his total and permanent disablement, or the withdrawal of the Company from the territory set forth in this contract, the Company will pay the Manager, his executors, administrators or assigns, commissions when and as set forth in this contract, less a collection fee of one per cent (1%); provided, however, that where the Manager is obligated to pay an agent or a broker a renewal commission of five per cent (5%); or a renewal commission of two and one-half per cent (2½%) or more upon premiums on which said Manager is entitled under this contract to but five per cent (5%) renewal commission, no collection fee shall be deducted from the said commissions as set forth in this contract,

during the period for which such renewals are payable to the said agent or broker.

(b) If terminated for any cause other than those mentioned in Paragraph, a or c hereof, the Company will pay to the Manager, his executors, administrators or assigns, commissions, when and as set forth in this contract, up to and including but not beyond the tenth policy year, less a collection fee of two per cent (2%) provided, however, that if the Manager has not been continuously in the service of the Company for at least two years no such commissions will be payable beyond the sixth policy year.

(c) If terminated because he has paid or offered to pay or allow as an inducement to any person to insure any rebate of premium, or if the Manager either during the continuance or after the termination of this contract shall default in the payment to the Company of premiums collected by him or shall take any action towards inducing the Agents of the Company to leave its service or make any attempt to induce its policyholders to relinquish their policies, he shall forfeit all commissions which have otherwise been reserved to him by this or any previous contract.

In Witness Whereof the parties hereto have executed this amendment in duplicate on the 17th day of May, 1927.

The Prudential Insurance Company of America

By

Asst. Secretary

Claude R. Fooshe,

Manager

No. 10204

In the United States Circuit Court of Appeals for the Ninth Circuit

CLAUDE R. FOOSHE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
WILLARD H. PEDRICK,
Special Assistants to the Attorney General.

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 54–69) reported in 46 B. T. A. 205.

JURISDICTION

This petition for review (R. 70–74) involved federal income tax for the taxable year 1938. On February 8, 1941, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of $1,436.37. (R. 7.) Within 90 days thereafter and on March 11, 1941, the taxpayer filed a petition with the Board of Tax Appeals for a redetermination of that deficiency under Section 272 of the Internal Revenue Code. (R. 3–12.) The decision of the Board sustain-

ing the deficiency was entered January 28, 1942. (R. 70.) The case was brought to this Court for review by petition filed April 23, 1942 (R. 70–74), pursuant to the provisions of Sections 1141–1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether renewal commissions on insurance policies sold in Missouri through the taxpayer's agency while he was there domiciled and received by him in California while domiciled there are his separate property taxable to him in full under Section 22 (a) of the Revenue Act of 1938.

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *

Civil Code of California (1937):

> SEC. 161a. *Interests in community property.* The respective interests of the husband and wife in community property during continuance of the marriage relation are present, exist-

ing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

SEC. 164. *Property acquired after marriage: Presumptions: Limitation of actions.* All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; * * *.

STATEMENT

The facts as stipulated by the parties and found by the Board may be briefly summarized as follows:

In 1919 the taxpayer entered the employ of the Prudential Insurance Company (referred to herein as the company) as manager of an ordinary agency in St. Louis, Missouri. Under the contract then drawn up (referred to herein as the old contract) the taxpayer was entitled, among other things, to a commission on all renewal premiums on policies written through his agency in an amount that for purposes of this proceeding is stipulated as two and one-half per cent. (R. 55, 59–60.)

These renewal commissions were to continue for a specified period of years after sale of the policies subject to reduction to one-half of one per cent if the taxpayer left the managership. (R. 61.) The contract

was amended in 1927 so as to largely eliminate this reduction on termination of the agency in the event of the agent's death, retirement, disability or the withdrawal of the company from the territory. If the agency was terminated for other causes, the reduction of the commission to one-half of one per cent was provided. In addition, if the contract was terminated because of a breach of trust by the agent, the entire commission was forfeited. (R. 40.)

Prior to May, 1938, the taxpayer was approached by the company on the subject of exchanging the St. Louis managership for one in Los Angeles, California. The taxpayer was agreeable save for the matter of financial arrangements. The nature of compenation provisions of the standard managerial contracts written by the company in 1938 differed from the old contract secured by the taxpayer in 1919 as amended in 1927. That fact and the smaller volume of policy sales in the Los Angeles agency meant a loss of income if St. Louis renewal commissions of two per cent were lost by the move. (R. 55–59.) In order to make it financially feasible for the taxpayer to accept the Los Angeles agency under the new type contract the company informally agreed to waive any right to a forfeiture of the two per cent. This agreement was expressed in a letter written by the taxpayer from St. Louis and confirmed in a letter from the company's New Jersey office addressed to him there. (R. 56.) Thereafter he entered into the standard new type contract to manage the Los Angeles agency and the old contract was formally cancelled. (R. 64–65.)

Between the time of his arrival in Los Angeles on or about May 1, 1938, when he established his domicile in California and the end of that year he received Missouri renewal commissions in the sum of $21,504.80. (R. 57.) He and his wife divided this income on their tax returns as community property. (R. 60.) Thereafter the Commissioner assessed a deficiency against the taxpayer in the amount of $1,436.37 principally on the ground that the entire $21,508.40 was the husband's separate property and taxable in full to him. (R. 54.) It is conceded that the one-half per cent commission payable under the old contract without regard to termination of the agency is the taxpayer's separate property. (R. 59.) The taxpayer contends however that the commissions from the two per cent (referred to herein as the renewal commissions) are community property. His appeal to the Board of Tax Appeals resulted in affirmance of the Commissioner's determination. (R. 70.) From that decision this appeal has been prosecuted.

SUMMARY OF ARGUMENT

The decision of the Board of Tax Appeals that the renewal commissions received by the taxpayer in California are his separate property is based on sound principles. If the test of the character of community property were, as contended by the taxpayer, domicile at the time the service was rendered, the renewal commissions here involved are his separate property. The services for which these commissions were paid the taxpayer in California were rendered in Missouri by the sale of the

original policies through the St. Louis agency managed by the taxpayer while there domiciled.

The issue as to where the service was rendered is in any event a factual question. Even if there is some basis for the taxpayer's version of the facts, the Board of Tax Appeals' determination on the evidence before it that the commissions were paid for services rendered in Missouri cannot be disturbed on appeal.

As a matter of fact the Board's decision that the renewal commissions are the taxpayer's separate property would have to be sustained even if part of the service for which they were paid was rendered in California. The right under the decisions of the Supreme Court to split community property between the spouses for federal tax purposes extends only to income classified as community property by the local law. Under the California law personal property acquired by the husband in a non-community property state while there domiciled remains his separate property on his removal to California. This is true even if the property is received by him in California for the first time. The test is not the place of receipt but domicile at the time of acquisition. Acquisition in turn does not mean securing an immediate right to the personal property. For community property purposes the making of a contract by the husband is an acquisition of a property interest so that personal property thereby received is deemed to have been acquired as of the contract date. Hence, such property is classified by reference to the law of the husband's domicile at the time the contract was entered into. Thus a contract secured by the husband in Missouri while domiciled there entitling him to renewal

commissions on insurance policies sold through his Missouri agency was separate personal property acquired by him there. Receipt of the fruits thereof in California did not convert this separate property. It was therefore taxable to the husband in full.

ARGUMENT

I

Under the "Domicile at Time of Service" Test of Community Property Asserted by the Taxpayer the Renewal Commissions Are His Separate Property

Following the taxpayer's move to California in 1938 he there received during the balance of the tax year some $21,504.80 as renewal commissions on insurance policies previously sold through his St. Louis, Missouri, agency and payable by virtue of a contract made by him while still domiciled in that state. The decision of the Board of Tax Appeals that these Missouri-based commissions are the separate property of the taxpayer and taxable to him in full is attacked on the theory that these commissions in some fashion represent pay for service rendered in California after he established his domicile there in May, 1938. From this the taxpayer would conclude that the commissions are community property under the California law. Whether that would follow if the commissions were based in part on California service is considered in the second portion of this brief. Even if this "law" propounded by the taxpayer be accepted, however, these commissions are his separate property for they were paid for service previously rendered in Missouri.

The outstanding characteristic of these renewal commissions received by the taxpayer after establishing his California domicile is the fact that they are based on and measured entirely by policies sold through the taxpayer's agency while he was domiciled in Missouri. There is nothing in the record that indicates any relation between particular California service rendered by the taxpayer in the tax year of 1938 and payment of these commissions. Nor is there any evidence that the company regarded them as compensation for any particular service there rendered. As a matter of fact the only management contract for the Los Angeles agency agreeable to the company was the standard new-type contract covering compensation for all service of agency management and that standardized contract was the one signed by the taxpayer. The compensation provided by that contract represented all the company would pay for the service rendered in California. The taxpayer's right to the renewal commissions on transfer to Los Angeles was the result of the company's previous waiver of any right to a deduction from compensation for service previously rendered in Missouri by the taxpayer while there domiciled. Thus under the "domicile at the time of service" test of community property asserted by the taxpayer the renewal commissions must be regarded as his separate property and taxable as such.

The taxpayer's argument to the contrary is based on aspects of the various contracts that are either of no significance or positively support the Commissioner's position. In brief, the taxpayer argues that under the old contract the renewal commissions were in reality

paid for collection of the premiums and that on leaving the St. Louis agency his right to the commissions was lost, so their continued payment, after he assumed management of the Los Angeles agency and ceased to perform the collection service for the Missouri policies, represented additional pay for management of that California agency. A number of factors require rejection of this version of the facts.

At the outset it may be observed that, while the burden of proof is on the taxpayer, he adduced no evidence to show that this collection service on the Missouri policies was of such character as could reasonably represent the true consideration for the renewal commissions. The fact that the taxpayer received no commission for collection under his California contract (Pet. Br. 5) raises the question whether that could reasonably be the case. In this connection it is significant that insurance agency contracts often make renewal commissions payable without regard to further service by the agent after the original sale. See *Helvering* v. *Eubank,* 311 U. S. 122, where such contracts were involved. Under such a contract the renewal commission is paid for the service in making the original sale and the fact that the commissions are conditioned on the payment of the renewal premiums by the policyholder does not obscure that fact. Presence in an agency contract of a provision forfeiting the commission on loss of the agency (thus providing an additional incentive for remaining with the company) does not establish that the commission is paid for collection of the renewal premiums. It establishes only that there may be a forfeiture of the earned commission in the named contin-

gency. That this represents the view of insurance men is indicated by the following statement from an article by James R. Love in the National Underwriter for April 9, 1937 (p. 2):

> When an agent places business on the books of a company he receives a vested interest in the form of renewals. When he resigns to represent another company or fails and turns to other business these renewals are often forfeited or subject to a deduction. The policyholder who continues to pay full premiums is "orphaned". * * *

In accord with this practical construction of these agency contracts is the statement in a letter to the taxpayer from his superior relative to the waiver agreement. In this letter it was stated that on transfer to Los Angeles the taxpayer would continue to receive the full renewal commission, that "in other words, no collection fee will be imposed on the business *for which you have qualified for renewal commissions.*" (R. 64.)

It is significant that neither the old contract nor its amendment refers to any portion of the commission on renewals as a "collection fee". That term is reserved for designation of pay for service in collection of premiums on which the agent is *not entitled to his renewal commissions or deduction by the company from the agent's renewal commission on termination of the agency.* (R. 61–62.) Moreover, the old contract itself in Section 21 (Pet. Br. 35) describes the loss of renewal commission on termination of the agency as a "forfeiture." Of surpassing significance also is the 1927 amendment of the contract providing in effect that the agent should receive the full two and one-half

per cent renewal commission if the agency was terminated by his retirement at 65, his death, disability, or the withdrawal of the company from the territory. In these contingencies the renewal commissions were to be paid *even though no collection service was given.*

The foregoing considerations are persuasive, in the conspicuous absence of proof by the taxpayer concerning the nature of the collection service, that such service was not the real consideration for the renewal commissions and that a provision for a deduction from the commission on termination of the agency was, however styled, a forfeiture of compensation already earned. Thus it is of no moment that the company could have imposed a forfeiture on transfer of the agent, if such was the case. Waiver of that forfeiture simply assured the taxpayer of his right to compensation for *service previously rendered by him in Missouri while there domiciled.*

The same conclusion is reached if the matter is approached with reference to the waiver agreement that preceded the taxpayer's transfer to Los Angeles. In connection with this agreement by the company to forego any deduction from the Missouri renewals on the transfer, the question may be asked whether, in the event of a wrongful discharge from the Los Angeles agency, the taxpayer would be entitled to the full renewal commissions as compensation for service previously rendered. That in turn depends on whether the commissions were payable for past service or future service.

Considerations detailed in the preceding paragraphs all support the view that the commissions were payable

for past services, subject to a possible forfeiture on transfer of the agent. At this point it may be observed that the old contract, as amended in 1927, stipulated against a forfeiture on certain contingencies terminating the agency through no fault of the agent, *viz.,* his retirement, death, disability or the withdrawal of the company from the territory. For practical purposes a transfer of the agent amounts to a "withdrawal of the company from the territory". A common sense interpretation of this old contract as amended would lead one to question the power of the company, on its own motion, to defeat the agent's right to renewal commissions by a transfer to another agency. Since the parties' relation was amicable that issue never ripened into a law suit. Their practical construction of the old contract approved treating a transfer similar to other agency-terminating contingencies not the agent's fault and made the renewal commissions on policies previously sold payable nothwithstanding the transfer.

It is noteworthy that none of the parties' correspondence expressing the waiver agreement (R. 64, 65) refers to any future service to be performed as the exchange for payment of the renewal commissions—on the contrary this correspondence stated that the commissions would be paid "same as had I (taxpayer) remained here (Missouri) only the Co. will bear expense for collecting to the 10th yr." and "no collection fee will be imposed on the business for which you (taxpayer) have qualified for renewal commissions". (R. 64.) It seems clear that the waiver agreement entered into by the parties prior to the taxpayer's move to California was a promise to pay for past service

subject only to a possible implied condition that he continue in the company's employ. This construction is further reinforced by the fact that the amount of the payments was to be measured by Missouri service, not California service. Finally, the compensation for service to be rendered in managing the Los Angeles agency was comprehensively covered by the standard new-type agency contract and that was the only contract the company was willing to make with respect to that service, a circumstance persuasive that the renewal commissions were paid for previous service in St. Louis. The management of that agency was at most only a condition, not the consideration for the renewal commissions. The *quid pro quo* for these payments was the past service rendered in Missouri.

Since the *waiver agreement* made the renewal commissions on policies previously sold payable after the transfer subject only to a possible implied condition that the taxpayer remain in the company's employ, it is clear that the company could not escape liability for these commissions by wrongfully discharging him. The *waiver agreement* gave the company no such power and none can be implied. Hence cases involving contractual provisions giving the company complete power to divest the agent of his right to renewals are irrelevant.[1] The significant contract, the waiver agreement,

[1] It is noteworthy that all cases cited in the taxpayer's brief (p. 12) as denying an agent's right to renewal commissions after termination of the agency are cases involving either an abandonment of the agency by the agent, wrongful conduct on his part justifying his discharge, or a contractual provision authorizing a forfeiture.

contained no such provision. When the contract simply provides for payment of renewal commissions without provision for forfeiture the company cannot escape liability therefor by wrongfully discharging the agent. Thus in *Lewis* v. *Atlas Mutual Life Ins. Co.,* 61 Mo. 534, it was held that the insurance company could not defeat the agent's right to renewal commissions by going out of business. In *Merchants Life Ins. Co.* v. *Griswold,* 212 S. W. 807, 813 (Tex. Civ. App.), elimination by the company of one type of policy was held ineffective to defeat the agent's right against it for renewal commissions thereon. For similar cases see 79 A. L. R. 887. Cf. *Kelly-Springfield Tire Co.* v. *Bobo,* 4 F. 2d 71 (C. C. A. 9th). These cases are in harmony with the general principle that an employer's liability under a promise of pay for service till the end of a period cannot be defeated with respect to services rendered by a wrongful discharge before the end of the period. *Roberts* v. *Mills,* 184 N. C. 406, 114 S. E. 530; *Zwolanek* v. *Baker Mfg. Co.,* 150 Wis. 517, 137 N. W. 769. For further citations see the annotation in 28 A. L. R. 346. See also Williston on Contracts (Rev. Ed., 1936), Vol. 3, Sec. 677.

In the event of the taxpayer's wrongful discharge from the Los Angeles agency it seems clear from the foregoing that he would certainly be entitled to full payment of the renewal commissions. If it be recognized that on a wrongful discharge the taxpayer would be entitled to full payment of the renewal commissions under the waiver agreement on the ground that such commissions represent pay for service previously ren-

dered, so also in this proceeding must it be concluded that the renewal commissions received by the taxpayer in California constituted payment for service rendered in Missouri while he was there domiciled. It is clear, of course, that such income is the taxpayer's separate property and taxable as such even though it was received in California. *Wrightsman* v. *Commissioner,* 111 F. 2d 227 (C. C. A. 5th); *Asher* v. *Welsh* (S. D. Cal.), decided May 24, 1938 (24 A. F. T. R. 1091, 1097); *Honnold* v. *Commissioner,* 36 B. T. A. 1190, 1195.

The fact repeatedly emphasized in the taxpayer's brief that it was payment of these commissions that made it financially feasible for the taxpayer to accept the Los Angeles agency and that this was the reason that prompted the company to enter into the waiver agreement is in nowise inconsistent with the conclusion that these renewal commissions were paid for past services. If the taxpayer was not entitled as a matter of right under the old contract to these commissions on his transfer then the waiver agreement was simply in the nature of a contract to pay a bonus for past service and the company's motivation in determining to make such payments does not change the character of the service upon which the payments were based.

Finally, it must be pointed out that the question where the taxpayer performed the service for which these commissions were paid is essentially one of fact. Were they paid for Missouri service or California service? The burden was on the taxpayer to prove the latter—in fact the evidence before the Board of Tax Appeals indicated that the commissions were paid for Missouri

service. The Board stated that "we come to the conclusion that the petitioner has not shown the income to be earnings of petitioner while a member of a marital community in California" and at a later point again stated that "in our opinion, this proceeding involves, not additional compensation earned in California, but performance of a condition involved in the contract wherein the amounts involved have their inception." (R. 66, 69.) This factual determination by the Board cannot, on the evidence in the record, be disturbed on appeal for the Board's findings of fact on conflicting evidence are conclusive. *Helvering* v. *Lazarus & Co.,* 308 U. S. 252; *Wilmington Trust Co.* v. *Helvering,* 316 U. S. 164; *Helvering* v. *National Grocery Co.,* 304 U. S. 282. As stated in this last case (p. 294), "To draw inferences, to weigh the evidence and to declare the result was the function of the Board."

In this appeal the fact that the commissions in question were paid for service in Missouri while the taxpayer was there domiciled must be taken as the fact and the decision of the Board accordingly affirmed.

II

Under the Fundamental "Domicile at the Inception of the Right" Test of Community Property the Missouri Renewal Commissions Are the Taxpayer's Separate Property

The consideration of the taxpayer's contention in the foregoing section is actually predicated on a legal proposition more favorable to him than that to which he is entitled. It is clear under the Supreme Court's decisions in *Poe* v. *Seaborn,* 282 U. S. 101, and *United States* v. *Malcolm,* 282 U. S. 792, according the

privilege of splitting community income between the spouses for federal tax purposes, that this privilege extends only to income classified as community property under the local law. This truism is accepted by the taxpayer (Br. 19) and the entire legal basis for his attack on the decision of the Board of Tax Appeals denying the right to report half of these commissions as his wife's income is the asserted proposition that "the character of income as community or separate under the [conflict of] laws of California is to be determined in accordance with the [property] laws of the husband's domicile at the time the income is earned * * *". (Br. 19.) None of the decisions cited under this asserted principle, however, presented the issue as to whether it is the property law of the state of domicile *at the time of service or at the time the right to the property was acquired* that governs. The taxpayer's reliance on the proposition quoted does raise that issue here, and in resolving it consideration must be given other authorities than those cited.

In Section 164 of the California Civil Code the Legislature of California undertook by statute to adopt a conflict of laws rule respecting classification of property that, if valid, would have required the conclusion that these Missouri commissions are community property. Under Section 164 the test prescribed was whether the property would have been community property if acquired by the spouse while domiciled in California. Since California follows the generally accepted view that the law of the domicile regulates the spouse's interest in acquisitions of personal property (see Cali-

fornia cases cited in the paragraph following) all personal property, under this statutory mandate, would become community property on establishment by the spouses of a California domicile. In the case of *Estate of Thornton,* 1 Cal. 2d 1, 33 P. 2d 1, the California Supreme Court held this portion of Section 164 unconstitutional on the ground that it attempted destruction of a vested right to personalty previously acquired as separate property by one of the spouses in a non-community property state, thus violating the due process clauses of both federal and state constitutions.

In the light of this decision the character of the taxpayer's commissions as community or separate property under California conflict of laws must be determined not by reference to the Code but by consideration of the California decisions on the subject. Under these decisions it is settled that personal property acquired by the husband in a non-community property state while there domiciled remains his separate property when removed to California on his establishing a domicile there. *Shea* v. *Commissioner,* 81 F. 2d 937 (C. C. A. 9th); *Estate of Thornton, supra; Estate of Arms,* 186 Cal. 554, 199 Pac. 1053; *Kraemer* v. *Kraemer,* 52 Cal. 302; *Estate of Frary,* 26 Cal. App. 2d 83, 78 P. 2d 760. For further citations see Leflar, Community Property and The Conflict of Laws, 21 Cal. L. Rev. 221, 226 (1932). Thus, if the separate property was acquired by the husband while domiciled in a non-community property state even though not received by him until domiciled in California it will retain its character as a separate property. *Wrightsman* v. *Commissioner,* 111 F. 2d 227 (C. C. A. 5th); *Asher* v. *Welsh* (S. D. Cal.), de-

cided May 24, 1938 (24 A. F. T. R. 1091, 1097). *Honnold* v. *Commissioner,* 36 B. T. A. 1190, 1195. See also *Preston* v. *Commissioner,* 35 B. T. A. 312, 322; *Houston* v. *Commissioner,* 31 B. T. A. 188. Furthermore the income from personal property acquired by the husband while domiciled in a non-community property state is his separate property though produced by it in California after his domicile is there established. *Shea* v. *Commissioner, supra.* The suggestion made in some of the early conflict of laws treatises that the law of the intended domicile governed with respect to acquisitions made in anticipation of a move to another jurisdiction has no support in the cases. Judge Goodrich, in his Conflict of Laws (1939), Section 120, reviews the authorities and finds that under the cases and on principle it is the law of the domicile at the time of acquisition, not the law of the intended domicile, that governs. This exhaustive treatment first appeared as an article in 27 Yale Law Journal 49. In accord with this view is the Restatement of the Conflict of Laws, Sec. 289.

Thus, under the California decisions above referred to, the test of the character of personal property is domicile at the time of its acquisition. That is the view held almost without exception in all of the community property jurisdictions. See the authorities collected by Leflar, *supra;* 92 A. L. R. 1347, 1348; and in Community Property, 11 Am. Jur. 184, Section 15. The question is, what constitutes acquisition? That issue is presented when the husband enters into a contract entitling him to property in exchange for services to be rendered in the future. Is the property acquired

for community property classification purposes when the contract is made or when the services are rendered? The answer is had by reference to the doctrine of "inchoate rights" which the taxpayer concedes to be well established in California. (Br. 20.) Under this doctrine, as is stated in the McKay's authoritative treatise on Community Property (2d Ed.), Sec. 517:

> * * * if the initial right rests in obligation, all that which is obtained through the performance, discharge, satisfaction, enforcement or assignment of the obligation, are deemed in law to have been acquired as of the date of the acquisition of the initial right, and take the character, as separate or common, of that right.
>
> The performance of conditions, or the payment of charges against a thing or its increase or improvement, does not convert it from separate into common property or *vice versa*, though it may in some cases create a charge against it. In brief a thing is deemed to be acquired as of the time of the acquisition of the initial right of which it is the development.

The taxpayer's reference to a later statement in this section to the effect that the doctrine of inchoate rights operates only with respect to rights valid in law or equity is no more than a straightforward statement that the contract must be binding. The matter is made clear beyond question in Section 535 of the same treatise where it is stated:

> If the contract is largely executory and the conditions and stipulations of the contract are burdensome, and are performed by the community, it may seem to some like a legal nicety devoid of substantial justice to refer the origin of the

> property to the date of closing the contract through which it was acquired; but generally justice is better subserved by the rule *now firmly established that property acquired by contract is deemed to have its origin as of the date of the contracts.* [Italics supplied.]
>
> And it is not difficult to find a justification for the rule: The contract itself is property, and having been acquired before marriage it is separate by force of the plain terms of the statute. If it should be sold without performance of the conditions clearly the proceeds of the sale would be separate, and if the conditions are performed after marriage through the expenditure of separate funds no one would insist that the property is common. The community may be reimbursed for its funds used to perform the conditions and when this is done even and exact justice is done to all; the separate estate obtains the advantages of its separate contract, or suffers the disadvantages of any, and the community is reimbursed for its outlay. If the circumstances impose no obligation to make reimbursement, this should not change the rule just stated.

This Court recognized and approved these principles in *Davidson* v. *Woodward,* 156 Fed. 915, certiorari denied, 209 U. S. 547, where it is stated that "Property purchased by a contract before marriage but not paid for until after marriage, is also separate property".

One of the leading cases on the subject is *Welder* v. *Lambert,* 91 Texas 510, 44 S. W. 281. There the husband entered into a contract in 1928 to introduce into the State of Coahuila and Texas a certain number of settlers. In return for this service he was to receive unspecified land to be selected by him on his perform-

ance of the agreement. He married in 1832. Some of the services called for by the contract was rendered before marriage and some afterwards. It was held that the property secured by this contract was entirely the separate property of the husband on the ground that, since the contract right was separate when secured, its fruits were likewise. In other words, the acquisition date is the contract date. That the question in the case was whether the property had been acquired before marriage rather than before change of domicile as here is not significant. The decision squarely holds that for community property classification purposes the date of acquisition is the date the binding executory contract for the property is made.

It may be noted in passing that the doctrine of inchoate rights is not one of "equitable conversion" limited in application to contracts for the purchase of real estate.[2] See McKay, Section 534, fn. 8. On its facts *Welder* v. *Lambert, supra,* simply involved an executory contract of service with unspecified land as the compensation. As observed in *Commissioner* v. *King,* 69 F. 2d 641 (C. C. A. 5th), in discussing the case:

> The facts of that case (*Welder* v. *Lambert*) negative the conclusion that the land was held to be the separate property of the husband because of his having had an inchoate title to that land prior to the marriage, as at the time of the marriage he had no claim to any specific or then

[2] Statement in some of the California decisions that the doctrine of "inchoate rights" rests on equitable title is only dictum. Refusal to apply the doctrine has been limited to the situation where no binding contract (i. e., no right) existed at the earlier date. Cf. *In re Boody*, 113 Cal. 682, 45 Pac. 858.

> identifiable land. The statements in the opinion in that case of the grounds upon which the conclusion reached was based indicate that the test therein stated for determining whether property is separate or common is applicable whether the property is real estate or personalty, land *or a sum of money.* (Italics supplied.)

The decision of *Commissioner* v. *King, supra,* is particularly instructive in the instant case. There the husband during marriage entered into a contract for the rendition of legal services on a contingent fee basis. Part of the services were rendered before and a part after the wife's death. The court followed *Welder* v. *Lambert, supra,* discussed above, and held that the property in the contingent fee had been acquired by the community on the formation of the contract so that the fee on its receipt was entirely community property and taxable on that basis.

Since, as seen above, the doctrine referring the acquisition date to the contract date is that of inchoate right rather than equitable conversion, California cases applying the doctrine to land contracts are equally authoritative with respect to contract secured property in general. Under these decisions it is settled that when a binding contract for property is entered into by the husband at a time when such property would be his separate property, the property secured thereafter is separate even though received when he is subject to the community property system and even though the community in fact contributed to the purchase of the property. *Estate of Pepper*, 158 Cal. 619, 112 Pac. 62; *In re Lamb,* 95 Cal. 397, 30 Pac. 568; *Harris* v. *Harris,* 71

Cal. 314, 12 Pac. 274. See also *Lake* v. *Lake*, 52 Cal. 428. The fact that the community in a probate proceeding may be entitled to reimbursement for its contribution to the performance of the contract does not alter the fact that property received by reason thereof is separate on its receipt by the husband in the first instance if the contract was entered into by the husband before he was subject to the community property system.[3] *Morgan* v. *Lones,* 80 Cal. 317, 22 Pac. 253; *Palen* v. *Palen,* 28 Cal. App. 2d 602, 83 P. 2d 36.

The California decisions thus accord with the general law of community property in that property is deemed to be acquired for classification purposes when the bind-

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[3] Under the Louisiana decisions proceeds of an insurance policy taken out by the husband before coverture are his separate property even though most of the premiums thereon were paid after marriage by community funds. Those decisions were reviewed with approval in the case of *Estate of Castagnola*, 68 Cal. App. 732, 230 Pac. 188. Consistent with this is the decision of the California Supreme Court in *Travelers' Ins. Co.* v. *Fancher*, 219 Cal. 351, 26 P. 2d 482, stating that the proceeds are community property "where premiums of an insurance policy issued on the life of a husband *after coverture* are paid entirely from community funds * * *." [Italics supplied.]

In *Modern Woodmen of America* v. *Gray*, 113 Cal. App. 729, 299 Pac. 754, the view was taken that payment of the premiums with community funds entitles the community to a proportionate portion of the proceeds. If this intermediate appellate decision represents the law of California it may be reconciled with the established doctrine of "inchoate rights" by virtue of the peculiar nature of insurance contracts—each year's premium payment is a renewal of the contract. Even if this peculiar feature of insurance contracts be disregarded, the community's share in the proceeds may be treated as merely a method of reimbursement. Since the contract involved in the instant case is not an insurace policy, any peculiar doctrine with respect to such cases is not here relevant.

ing contract for it is made. With this proposition clearly established, accurate statement of the California conflict of laws principle applicable to the instant case is simple. It will be recalled that California follows the accepted view that property acquired by the husband in a non-community property state while there domiciled is his separate property even though removed by him to California after he is there domiciled. Since acquisition means the inception of the right, or to put it otherwise, the formation of the binding contract for the property, it is seen that the test of property acquired by the husband is domicile at the time of the formation of the contract, not as stated by taxpayer's counsel, domicile at the time of its performance. The parade of horribles considered by the taxpayer as naturally following from such a rule of law (Br. 22) is easily seen as illusory if regard is had for the fact that the test has reference to domicile at the time of contracting—not mere physical presence in the state.

Whether the non-community property law of domicile at the time of contracting would govern if the entire performance took place in a community property state after the spouses settled there need not be decided here. Certain it is under the authorities above reviewed that the law of domicile at the time of contracting does control where a part of the performance takes place in that jurisdiction. It appears from the record that the taxpayer managed an insurance agency in St. Louis for a number of years prior to May, 1938, under a contract entitling him to a two and one-half per cent renewal commission on policies sold through his agency.

It was provided by the contract, as amended in 1927, that if the contract was terminated, save by death, retirement, disability or withdrawal of the company from the territory, that a two per cent commission fee would be deducted from these renewal premiums leaving him only one-half of one per cent as commission. In order to induce him to assume management of their Los Angeles agency the insurance company by a contract made while the taxpayer was domiciled in Missouri and confirmed under a letter to him there from the company's New Jersey office (R. 44) bound itself to pay the full two and one-half per cent commission for the periods specified in the original agency contract on his transfer, thus treating this contingency of transfer as comparable to those enumerated in the 1927 amendment contract not justifying a forfeiture. It cannot be denied that the original source of these renewal commissions was the old agency contract made in Missouri and the sale of policies through the taxpayer's agency in St. Louis while he was there domiciled. Nor can it be denied that the contract recognizing his right to continued payment of the St. Louis commissions on his transfer to Los Angeles *was made while he was still domiciled in Missouri.* Thus we have a case where the contract for payments received by the taxpayer was not only acquired, while he was domiciled in Missouri, as separate property but as well these payments were to be made on the basis of a previous expenditure of the taxpayer's separate property—his service in Missouri while there domiciled. Under the established doctrine of "inchoate rights" the renewal commissions must therefore be deemed to have been acquired by the taxpayer in

Missouri while there domiciled and hence classified as his separate property on their receipt in California.

If there was any basis for a claim for reimbursement by the community for services rendered by the husband in California in connection with these renewal commissions that claim is not here in issue.[4] Failure by the taxpayer to establish the amount to which the community is entitled to reimbursement (*Shea* v. *Commissioner, supra*) and the further damning fact that no such claim has been asserted against him require the conclusion that the receipt is taxable to him in full—his income is reported on a cash basis. In *Commissioner* v. *King, supra,* part of the service had been rendered subsequent to the termination of the community by the wife's death. It was argued that the income thereby produced constituted the taxpayer's separate property since his personal estate was entitled to reimbursement from the community in that amount. In answer to this argument the court observed that no such claim for reimbursement had been made and concluded (p. 642): "This being so the question of whether such a claim would have been allowable if it had been made is not presented for decision." The entire fruits of the contract were there taxed on the basis of the existence of the community on the date the contract was made.

It must be concluded that whether the test of community property is domicile at the time of service or

[4] That such service could not constitute the entire price for the commissions is indicated by the authority cited by the taxpayer's brief, p. 13, to the effect that "the right to commissions on renewals rests, *in part*, on the consideration of the services by the agent to the company in keeping the policies written by him alive". [Italics supplied.]

domicile at the inception of the right these Missouri renewal commissions are the taxpayer's separate property. Any alleged right of reimbursement in the community is neither in issue here nor is there any foundation for such a claim in fact. These commissions were paid for previous service by the taxpayer in Missouri while there domiciled under a contract made while he was still there.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should therefore be affirmed.

Respectfully submitted.

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OCTOBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 10204

IN THE

United States Circuit Court of Appeals

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CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S CLOSING BRIEF.

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Statement.

In its Statement (Resp. Br. p. 3), respondent states "Under the contract then drawn up (referred to herein as the old contract) the taxpayer *was entitled*, among other things, to a commission on all renewal premiums on policies written through his agency in an amount that for purposes of this proceeding is stipulated as two and one-half per cent. [R. 55, 59-60.]" (Italics supplied.)

The sense in which the taxpayer was "entitled" to receive a renewal commission of 2½% on all renewal premiums written through his agency in St. Louis must

be unequivocably, stated and clearly understood at the outset. The use of the word "entitled" in connection with that part of the renewal commission represented by 2% of the premium* involves a predetermination of the fundamental issue of this proceeding.

The managerial contract entered into between petitioner and the Prudential Insurance Company on August 4th, 1919 (Pet. Br. pp. 29-37) provided in section 3 that so long as the manager remained in the employ of the company, his compensation would be a commission on premiums *when collected* as specified in that section. It was stipulated between the parties that the manager was entitled to retain personally only 2½% of the premiums set forth in section 3 inasmuch as the balance of the various percentages therein set forth was paid to the agent who wrote the policy. [Stip. 15, R. p. 19.] Petitioner was entitled, under the contract, to retain this commission of 2½% of the premium *only* in the event he collected the premium. *If, for any reason,* the renewal premium (or the first year premium, for that matter), was not collected by the manager during the existence of the contract, the company retained 2% of the premium as a collection fee. (Para. 2 of Sec. 4, Pet. Br. p. 30.)

Similarly, upon termination of the contract, when petitioner could not collect the premium, the company retained 2% of the premium as a collection fee. (Sec. 6, Pet. Br. pp. 31-32.) Likewise, whenever petitioner col-

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*While respondent indicates (Resp. Br. p. 5) that the sums represented by the 2% portion of the renewal commission of 2½% are referred to in its brief as "renewal commissions", such reference is misleading inasmuch as the sums received are in fact comprised of two factors; namely, the 2% of the premiums represented by the collection fee, and the ½% represented by petitioner's renewal interest.

lected the premiums on policies not provided for in section 3 of the contract, he retained 2% of the premium as a collection fee. (Pars. 1, 3, Sec. 4, Pet. Br. p. 30.)

Thus, the 2% of the premium was not retained by the company *only* if petitioner left the managership of the agency, as respondent implies in its statement in its brief, page 3, nor was the retention of the 2% of the premium as a collection fee a forfeiture, as respondent states in its brief, page 4. The retention of the 2% of the premium by the company as a collection fee upon the termination of the contract was only one application of the agreed measure of compensation to which the party making the collection was entitled. This was true whether the contract was terminated or remained in effect. The forfeiture that occurred under the contract was that provided for in sections 7 and 8. (Pet. Br. p. 32.) Under these provisions, in the event of violation of the contract, petitioner would have forfeited the ½% of the premium to which he was "entitled" upon the termination of the contract.

Summary of Argument.

The character of income resulting from the rendering of personal services is determined by the laws of the husband's domicile at the time the services are rendered, and the services for which the petitioner received the sums represented by the 2% of the renewal premiums were rendered in California. The issue is not, as respondent states in its brief, page 6, as to "where the service was rendered", nor is it a factual question. The issue is as to where the services were rendered by which petitioner earned the sums represented by the 2% of

the premium. Services were rendered by petitioner in both St. Louis and California, but the determination to be made is as to whether the sums represented by 2% of the renewal premium were earned in St. Louis by reason of services rendered there, or whether the sums measured by 2% of the renewal premiums were earned through the rendering of services in California. The determination of the Board of Tax Appeals on this question was one of law and is binding on appeal only in the event it was correct.

Respondent's statement that the sums derived from the 2% of the premium are the taxpayer's separate property, even if part of the service for which they were paid was rendered in California, and its assertion that for community property purposes the making of a contract by the husband is an acquisition of property interest, so that income received from the rendering of services is deemed to have been acquired as of the contract date, is not supported by the decisions of this Court or of the California Courts. The controlling decisions are to the contrary. It is settled law under these decisions that the character of income is determined by the law of the husband's domicile ~~and~~ at the time the services were rendered, and not by the law of his domicile at the time the contract was signed.

ARGUMENT.

I.

Under the "Domicile at Time of Service" Test of Community Property, the Sums Represented by 2% of the Premiums Are Community Property.

Respondent's statement that

> "There is nothing in the record that indicates any relation between particular California service rendered by the taxpayer in the tax year of 1938 and payment of these commissions. Nor is there any evidence that the company regarded them as compensation for any particular service there rendered. As a matter of fact, the only management contract for the Los Angeles Agency agreeable to the company was the standard new-type contract covering compensation for all service of agency management and that standardized contract was the one signed by the taxpayer. The compensation provided by that contract represented all the company would pay for the service rendered in California." (Resp. Br. p. 8.)

does not accurately reflect the record in this proceeding. All the testimony in the record is to the effect that the petitioner's services as manager of the Los Angeles Agency were the basis for the payment of the sums measured by the 2% of the renewal premiums. Thus, petitioner's letter to Mr. Chace, Vice-President of the Prudential Insurance Company [Ex. D, R. pp. 41-44], the postcript of which sets forth petitioner's understanding with reference to the receipt of these sums, clearly indicates that the receipt of the sums is in connection with the transfer to the Los Angeles Agency and is in fulfillment of the duties as manager in that Agency.

Similarly, the letter of Mr. Chace to petitioner [Ex. E, R. pp. 44-47] clearly indicates that the sums involved herein were to be received in connection with the services of petitioner as manager of the Los Angeles Agency. Mr. Chace's statement [Ex. H, R. pp. 51-53] does not leave any room for doubt on this point. He states [R. p. 52]

> "It was felt by waiving this 2% collection fee that the amount that would accrue to Mr. Fooshe together with the guaranteed salary to be paid him would be ample compensation for the supervision of the Los Angeles Agency."

Thus, it is patent that respondent's statement

> "The compensation provided by that contract represented all the company would pay for the service rendered in California." (Resp. Br. p. 8.)

and the similar statement (Resp. Br. p. 13) are directly contrary to the positive understanding of the parties as they have expressed it.

Respondent's statement (Resp. Br. pp. 8, 9) that

> ". . . the taxpayer argues that under the old contract the renewal commissions were in reality paid for collection of the premiums"

is misleading.

Petitioner does not argue, as respondent states (*supra*) that *all* of the sums represented by the renewal commission of 2½% were in reality paid for the collection of premiums under the old contract. Petitioner's position has always been that under the old terms contract, petitioner earned the ½% portion of the renewal premium in the writing of the policy and that the 2% portion of

the renewal premium representing the collection fee was earned at the time, and by the party by whom the collection was made, in the collecting of the renewal premium itself. Petitioner had the right to receive sums represented by the ½% of the renewal premiums upon the termination of the old contract, but he had no right to receive sums represented by the 2% of the renewal premiums unless he collected the premiums, whether the contract was terminated or remained in effect.

When respondent states in its brief, page 9,

> ". . . while the burden of proof is on the taxpayer, he adduced no evidence to show that this collection service on the Missouri policies was of such character as could reasonably represent the true consideration for the renewal commissions."

respondent entirely disregards the provisions of the old contract itself. The contract, of course, was determinative of the rights of the parties and it is obvious, as petitioner demonstrated in his opening brief (pages 9-13), that the parties to the contract agreed that sums represented by 2% of the renewal commission were the consideration for the collection service. No better proof than the agreement of the parties can be adduced, but if further evidence were required, the statement of petitioner in the postscript of the letter setting forth the agreement with reference to his transfer to the Los Angeles Agency clearly indicates his understanding of the sums represented by the 2% of the renewal premiums, when he said

> "I understood I would receive the full renewals same as had I remained here, only the company will bear expense for collecting to the 10th year." [R. pp. 43-44.]

Under the contract, the agreed measure of this expense was the 2% collection fee. (Secs. 4, 6, Pet. Br. pp. 30-32.]

In the light of the express provisions of the old contract, respondent can take little comfort from the fact that the California contract (an entirely new type contract) did not provide for the payment of collection fees, (Resp. Br. p. 9), or that the contracts of other insurance companies did not provide for collection fees and made the receipt of renewal commissions of unspecified amount independent of further service by the agent (Resp. Br. p. 9), or statements with reference to other contracts which are not shown to be identical with or even similar to the contract between these parties. (Resp. Br. pp. 9-10.) Such considerations are patently immaterial.

Nor can respondent find support for its argument in that portion of Mr. Chace's letter to petitioner which is quoted, as follows:

> " 'in other words, no collection fee will be imposed on the business for which you have qualified for renewal commissions.' " (Resp. Br. p. 10.)

This statement must be read in the light of the express provisions of the contract. Business qualified for renewal is comprised of those policies as to which section 3 of the contract is applicable, as has been demonstrated in petitioner's opening brief, pages 9-12, and herein. The renewal commission of 2½% of the premiums provided for in section 3 was comprised of 2% of the premium as a collection fee and ½% of the premium as a renewal interest. While the contract does not spell this out in that detail, it is clear that such is the fact from the

force of paragraph 2 of section 4 of the contract. Clearly, the 2% of the premium on business qualified for renewal commission is earned only when collection is made although the renewal interest of the ½% of the premium was earned in the writing of the policy whether the contract is in effect or is terminated.

Mr. Chace, in making the statement, did no more than designate the measure by which the additional compensation which petitioner was to be paid for his management of the Los Angeles Agency was determined. This particular method of measuring the additional income and the amount that would be received therefrom was selected because, in the words of Mr. Chace,

> "It was felt by waiving this 2% collection fee that the amount that would accrue to Mr. Fooshe together with the guaranteed salary to be paid him would be ample compensation for the supervision of the Los Angeles Agency." [Ex. H, R. 52.]

In making the statement that the term "collection fee" is "reserved for designation of pay for service in collection of premiums on which the agent is not entitled to his renewal commissions or deduction by the company from the agent's renewal commission on termination of the agency," (Resp. Br. p. 10.) respondent completely avoids paragraph 2 of section 4 of the contract, as has been previously noted. It is this paragraph that makes it clear beyond doubt that the sums represented by the 2%, by whomever received, represented the fee for the collection service.

Nor do the 1927 amendments to the contract have the significance which respondent would accord them. The

character of the collection fee of 2% of the premiums having been clearly established under the old contract, the company had the right to provide for a conditional waiver of the collection fee in certain instances. This did not change the character of the collection fee or its amount in cases to which section (a) of the amendments relating to terminal commissions (Pet. Br. p. 39) was not applicable.

Respondent's argument that the transfer of the agent amounts to "a withdrawal of the company from the territory" (Resp. Br. p. 12) is patently unfounded and not in accord with the simple fact. The company still operates the St. Louis Agency, for while the petitioner was a valuable man to the company, he was not indispensable to the company's operation in that area. Likewise, respondent's statement that the parties treated the termination and transfer that occurred here as similar to other agency-terminating contingencies without fault and therefore made the renewal commissions payable notwithstanding the transfer (Resp. Br. p. 12), is in direct conflict with the terms of the contract and the actions of the parties.

Paragraph (b) of the 1927 amendments relating to terminal commissions (Pet. Br. p. 40) provides for termination without fault and the full collection fee of 2% of the premium is retained by the company. Paragraph (c) of the 1927 amendments relating to terminal commissions (Pet. Br. p. 40) is the only provision for termination because of the fault of the manager and it would require forfeiture of the ½% of the premium constituting the manager's renewal interest, to which he was entitled upon the writing of the policy. Petitioner's contract was terminated under paragraph (b).

Petitioner realized that under this paragraph he would not receive the sums represented by the 2% collection fee upon the termination of the old contract and his acceptance of a new contract. He therefore entered into an express agreement providing for the payment of the sums represented by this 2% collection fee as additional compensation for his services as manager in the Los Angeles Agency. This is clear from the exchange of letters and from Mr. Chace's direct statement to that effect. The parties never contemplated, nor did they make, the adjustments that would have been required by paragraph (a) of the Amendments of 1927. (Pet. Br. p. 39.)

Respondent then argues (Resp. Br. p. 13) that the fact that the amount of the additional compensation to be received by petitioner was measured by premiums derived from policies in the St. Louis Agency requires the conclusion that the sums thus received were for services rendered in Missouri. This is in direct conflict with the express agreement of the parties and the statement of Mr. Chace. Yet inasmuch as it involves respondent's basic point of approach to the issue here presented, it may be well to give it further consideration.

That respondent's argument on this point is without substance is obvious under the decision of the California Supreme Court in *French v. French,* 17 Cal. (2d) 775, 112 Pac. (2d) 235. In this case, involving an action for divorce, the husband was to receive certain moneys for a period of years as a member of the Fleet Reserve of the United States Navy. The wife claimed a half interest in the "retired pay" to be received in the future by the husband, on the theory that the moneys had been earned during their marriage, while the husband was a member of the United States Navy, and that consequently the

"retired pay" belonged to the community although payment was to continue into the future. The statute involved was the Naval Reserve Act of 1938, Secs. 1, 206, 34 U. S. C. A., Secs. 853, 854e. Under this statute, the husband, as a member of the Fleet Reserve, could not be required to perform more than two months' active duty in the Navy in each four-year period. The only other requirement was that he submit to a physical examination at least once during each four-year period. The "retired pay" which he would receive was based upon the amount he was receiving in active service at the time of his transfer to the Fleet Reserve. It was the theory of the wife that because the services required were in no manner commensurate with the "retired pay" received, such "retired pay" was earned by prior services rather than present services. The theory of the wife and the lower court which awarded her a one-half interest in the "retired pay" was precisely that which respondent urges. The Supreme Court held, however, that inasmuch as the husband was required to perform some service, the "pay" was earned by present services and consequently, after the divorce, would be the separate property of the husband. The lower court was reversed.

It should be noted further that the services in the instant case were commensurate with the additional compensation to be received by petitioner for his services in California [Ex. H, R. 51-52] although the parties for convenience adopted as a measure of the amount to be paid for such services, policies which were in effect in the

St. Louis Agency. The reasons for adopting this method of measurement clearly appears from the facts facing the parties with reference to the two agencies and from Mr. Chace's statement. It is submitted that this decision is decisive of the instant case.

Respondent further argues that the waiver agreement between petitioner and the Prudential Insurance Company with reference to the payment of the sums represented by the 2% of the premiums was subject only to a possible implied condition that the taxpayer remain in the company's employ, and therefore in the event of a wrongful discharge of the petitioner, the company would remain liable for the sums represented by the 2% of the premium. While the agreement with reference to the payment of the sums represented by the 2% of the premium is in fact subject to more than the implied condition that the taxpayer remain in the company's employ, *i. e.,* continued rendering of services by the petitioner in Los Angeles, yet a determination of the question of whether the company would be liable under the terms of the waiver agreement for the payment of further sums represented by the 2% of the premium in the event of wrongful discharge (Resp. Br. pp. 13-15) does not have even a remote bearing upon the fundamental issue as to the character of the income.

That this argument is nothing more than a makeweight is apparent when respondent's conclusion in the remarkable sentence

> "If it be recognized that on a wrongful discharge the taxpayer would be entitled to full payment of the

> renewal commissions under the waiver agreement on the ground that such commissions represent pay for service previously rendered, so also in this proceeding must it be concluded that the renewal commissions received by the taxpayer in California constituted payment for service rendered in Missouri while he was there domiciled." (Resp. Br. pp. 14, 15.)

is examined. In other words, respondent states that if it is admitted that the renewal commission (the sums represented by 2% of the premium which is here involved) was earned through services rendered in Missouri and that respondent would be entitled to receive such commission in the event of his wrongful discharge, then it must be concluded that the services were rendered in Missouri. It is obvious that the conclusion announced is merely a restatement of the matter admitted and the question of wrongful discharge has not the slightest relation to the conclusion stated. The logical process involved is apparent when one considers that if it is originally admitted that the commission was earned through services rendered in California, the conclusion is likewise inescapable that the commission was earned in California.

Respondent's final argument under its Point I is that the issue, where the services were performed for which the sums represented by the 2% of the premium were paid, is essentially one of fact. The only factual question is whether services were rendered in Missouri or California. Obviously, they were rendered in both places. However, the question of whether the sums represented by 2% of the premium were paid for services in Missouri or Cali-

fornia can be resolved only by a determination of petitioner's rights under the various contracts between the company and himself. This is clearly a legal question and was so recognized by the Board of Tax Appeals in the very language of its opinion cited by respondent. (Resp. Br. p. 16.) It might also be observed that there is no conflicting evidence in the record. The facts were stipulated, and none of the facts necessary for a determination of this point was left unresolved. It is a truism that under such circumstances the conclusions of the Board and its finding are reviewable and are binding upon this court only in the event that they are correct.

Respondent did not discuss, nor has it met in its argument, the controlling cases cited in petitioner's brief, page 12, which clearly establish that under the St. Louis Agency contract that existed between petitioner and the Prudential Insurance Company, petitioner had no right, legal or equitable, to sums represented by the 2% of the premiums, either while the contract was in effect or upon its termination. The conclusion is inescapable that such sums could not and did not represent compensation for services rendered in Missouri. Likewise, respondent ignored the unequivocal statement of Mr. Chace with reference to the agreement between the parties with reference to the payment of sums represented by the 2% of the premiums. The agreement of the parties and Mr. Chace's statement demonstrate that such sums were paid for services rendered in California at a time when petitioner was domiciled in California. As such, these sums were income to the community and were properly returned by petitioner and his wife.

II.

Under the Controlling Decisions in California, the Sums Represented by 2% of the Premiums Are Community Property as the Services for Which They Were Paid Were Rendered in California While Petitioner Was Domiciled There.

Respondent states (Resp. Br. p. 17) that none of the decisions cited in petitioner's opening brief presented the issue as to whether it is the property law of the state of the domicile at the time of service or at the time the right to the property was acquired that governed. Petitioner submits that the decisions cited are to the effect that the property law of the state of the domicile at the time services are rendered determines the character of the income. This proposition is so well established, however, that it need not rest on the cases cited if in the opinion of the respondent they are insufficient. In cases coming before this Court and the Courts of California, the proposition has been clearly determined.

Rogan v. Delaney, 110 Fed. (2d) 336 (C. C. A. 9);

Russell v. Langharn, 20 Fed. (2d) 95 (C. C. A. 9);

French v. French, supra;

McBride v. McBride, 11 Cal. App. (2d) 521, 54 Pac. (2d) 480;

Travelers Insurance Co. v. Fancher, 219 Cal. 351, 26 Pac. (2d) 482;

New York Life Insurance Co. v. Bank of Italy, 60 Cal. App. 602, 214 Pac. 61;

Modern Woodmen of America v. Gray, 113 Cal. App. 729, 299 Pac. 754;

Vieux v. Vieux, 80 Cal. App. 222, 251 Pac. 640.

As respondent states, personal property acquired by the husband in a non-community property state while there domiciled remains his separate property when removed to California on his establishing a domicile in that state. The definitive point in petitioner's argument in the instant case, however, is as to whether petitioner acquired the sums represented by 2% of the premiums in Missouri under the contracts executed while petitioner was domiciled in Missouri. Petitioner will not re-examine the provisions of the contracts and the controlling decisions (Pet. Br. p. 12) which clearly establish as a matter of law that under the old contract as amended petitioner had no right, equitable or legal, to the sums represented by 2% of the premiums. In its argument to avoid the effect of the contract and these decisions, respondent urges that inasmuch as the old contract was written in Missouri, in some way petitioner's right to the sums represented by 2% of the premiums had its inception in this contract. Or, if petitioner's rights did not have their inception in the old contract, they had their inception in the agreement under which petitioner came to California to take charge of the Los Angeles Agency, and as this agreement was written while petitioner was domiciled in Missouri, sums earned under this contract were his separate property. At the outset, it should be observed that if petitioner's theory is correct, the sums earned by petitioner under the new terms agency contract also would be petitioner's separate property inasmuch as it was signed prior to the time petitioner was domiciled in California. Respondent has never claimed that these sums were petitioner's separate property, and it would appear that this is a cogent answer to the argument which respondent makes.

The answer, however, rests on more compelling authority. With the exception of cases dealing with the purchase or acquisition of real property, respondent did not cite any authority, with the exception of quotations from McKay's Community Property, Second Edition, in support of its statement that the laws of the husband's domicile at the time of the signing of a contract determine the community or separate character of the results of the contract. Respondent also stated, to strengthen his lack of other authority, that petitioner concedes that the doctrine of inchoate rights is well established in California. Petitioner stated that the doctrine of inchoate rights was well established (Pet. Br. p. 20), relying upon general statements in some cases. In the law of community property of the State of California, with the exception of early cases pertaining to the purchase of real property and involving the doctrine of equitable conversion, it is well settled that the doctrine of inchoate rights does not apply. The Courts of California and this Court have held that the status of the parties at the time of the creation of contractual rights was not decisive but that the status of the parties at the time of payment of consideration or performance under the contract is the controlling factor. Thus, in *Rogan v. Delaney, supra,* a case involving the purchase of corporate stock, this Court did not accord any weight to the date upon which the contract for the purchase of the stock was entered into in determining the community character of the rights acquired in the stock. The date of the payment of the consideration for the stock

was the determining factor. This rule was likewise applied in a case involving community and separate rights in real property acquired partly with separate funds and partly with community funds. *(Russell v. Langharn, supra.)* In this case, commensurate and separate interests also were apportioned in the property commensurate with their relative contributions to the purchase price.*

In the cases involving insurance contracts and the payment of premiums under such contracts, the California Courts have consistently held that the community or separate rights in the insurance fund were not to be determined by the status of the parties at the time the contract was entered into, but community or separate interests in the insurance fund have been apportioned to the community or separate interest commensurate with the contributions made from community or separate funds.

McBride v. McBride, supra;

New York Life Insurance Co. v. Bank of Italy, supra;

Modern Woodmen of America v. Gray, supra;

Travelers Insurance Co. v. Fancher, supra.

In *New York Life Insurance Co. v. Bank of Italy, supra,* the early California case of *In re Webb,* Myr. Prob. 93, was cited with approval. This case held that where the decedent had paid one-half of the premium while he was single and subsequently two-thirds while he was mar-

*As to the application of a similar rule of law in the State of Washington, see *In re Kuhn's Estate,* 132 Wash. 678, 233 Pac. 293.

ried, the proceeds of the policy would be divided as one-half separate property and two-thirds community.

Respondent attempts to distinguish the decision in *Modern Woodmen of America v. Gray, supra,* on the basis that insurance contracts are peculiar in that each year's premium payment is a renewal of the contract. This argument was urged upon the Court in *McBride v. McBride, supra; Modern Woodmen of America v. Gray, supra,* and *New York Life Insurance Co. v. Bank of Italy, supra,* and the Court in each case rejected it, holding that the contract of insurance was entire. Respondent also seeks to distinguish the rule of these cases by stating that it is doctrine peculiar to insurance cases. In view of the decisions of this Court and of the California Supreme Court in *French v. French, supra,* and *Vieux v. Vieux, supra,* such a position cannot be maintained.

In the light of the uniform holding in all these cases that the results of the contract will be apportioned upon a basis commensurate with the respective contribution of separate or community property to the fulfillment of the contract, respondent's argument (Resp. Br. p. 27) that the community has only a right of reimbursement secured through filing a claim against the separate property cannot be sustained. This doctrine may be employed in other states but it is not the law in California and consequently is not controlling. This argument was examined in *New York Life Insurance Co. v. Bank of Italy, supra,* and it was expressly held that it is not in accord with California law on the subject.

Were there no other authorities, *French v. French, supra,* would be decisive. This case, as has been stated earlier, was an action for divorce in which the wife claimed a community interest in future payments of "retired pay" that her husband would receive after divorce. The "retired pay" was received under the provisions of the Naval Reserve Act of 1938, Secs. 1, 206, 34 U. S. C. A., Secs. 853, 854e. This statute was contractual in nature and if the doctrine of the inception of contractual rights which respondent urges was the law in California, the wife's claim necessarily would have been sustained. The court held, however, that the "retired pay" was to be received for services to be rendered after the husband's divorce and consequently would be his separate property.

Respondent finally argues that if part of the services were rendered in California and part of the services were rendered in Missouri, the income would be the separate income of the petitioner. Petitioner has recognized that if the sums attributable to the service in Missouri could be segregated, such sums would be the petitioner's separate property. Thus, petitioner conceded that the ½% of the premium to which petitioner was entitled from the writing of the policies in Missouri was his separate property. However, in the event that the income attributable to the services rendered in the two states could not be segregated, it is well settled under California decisions that the burden would be upon the Commissioner to demonstrate the separate character of the income.

Porter v. Nelson, 42 Cal. App. (2d) 750, 109 Pac. (2d) 996.

Factually, however, it is clear that all of the services for which petitioner received the sums representing 2% of the premiums were rendered by him in the supervision of the Los Angeles Agency while petitioner was domiciled in California. It is submitted, therefore, that the sums representing 2% of the premium paid to petitioner for services rendered in California while petitioner was domiciled there were the income of the community although the agreement under which these services were performed was entered into in a non-community property state.

Conclusion.

The decision of the Board of Tax Appeals should be reversed.

Respectfully submitted,

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